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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-673

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., a Delaware Corporation,

Petitioner,

v.

WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency, and the ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1972.

No. .

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., A DELAWARE CORPORATION,

Petitioner,

v.

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment herein of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on September 12, 1972.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, p. 39, hereinafter simply A39) is not yet officially reported. It has been reported unofficially at 4 E. R. C. 1567. In its judgment (A38), the Court directed that the cause be remanded to the District Court with directions to enter an order of dismissal for lack of jurisdiction. The opinion of the District Court is reported at 342 F. Supp. 1006 (D. Del. 1972) (A6).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 12, 1972. Petitioner did not move for rehearing. On October 2, 1972, the Court of Appeals granted a motion by petitioner to stay the mandate of the Court pursuant to 28 U. S. C. § 2101(f) and Rule 41(b), Federal Rules of Appellate Procedure, pending the disposition of its petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does the District Court have jurisdiction of this action under the Administrative Procedure Act ("APA"), 5 U. S. C., Chapter 7; the Declaratory Judgment Act; 28 U. S. C., Chapter 151, as amended; 28 U. S. C. § 1337; the National Environmental Policy Act ("NEPA"), 42 U. S. C., Chapter 55; and the Clean Air Act, 42 U. S. C., Chapter 15B?

2. Should an injunction issue against the enforcement of a compliance order purportedly issued under § 113(a)(4) of the Clean Air Act (42 U. S. C. § 1857c-8), where said order was totally unwarranted by the facts, arbitrary, unreasonable and unlawful under the Clean Air Act?

3. Does the Fifth Amendment to the United States Constitution entitle petitioner to an injunction against the enforcement of a compliance order purportedly issued by the Environmental Protection Agency under § 113(a)(4) of the Clean Air Act (42 U. S. C. § 1857c-8), pending the holding of a due process hearing, where no special circumstances exist which would justify summary adjudication, where enforcement of the compliance order would result in

the irrevocable destruction of valuable property rights, and where failure to comply with said order for the purpose of contesting its validity would give rise to the substantial risk of incurring cumulative criminal penalties and/or prison terms?

4. Does the statutory scheme of the Clean Air Act, which vests primary responsibility for the promulgation, amendment and enforcement of applicable implementation plans in the states, entitle petitioner to a stay of enforcement of a federal compliance order pending the resolution of its application for a variance from the applicable implementation plan which is now pending before the Delaware Water and Air Resources Commission?

5. May the Environmental Protection Agency enforce a compliance order purportedly issued under § 113(a)(4) of the Clean Air Act (42 U. S. C. § 1857c-8) without having first prepared and circulated an environmental impact statement with respect to either the approval of the applicable state implementation plan, the compliance order, or both as mandated by the National Environmental Policy Act (42 U. S. C. § 4332(2)(C)), which requires that all federal agencies issue an "environmental impact statement" with respect to every "major federal action"?

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED.

1. The compliance order in question was issued purportedly under 42 U. S. C. § 1857c-8(a)(1) and (4), which provide as follows:

> "(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an ap-

plicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

"(4) An order issued under this subsection (other than an order relating to a violation of section 1857c-7 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers."

2. Failure to obey the compliance order may give rise to a substantial fine or imprisonment or both under 42 U. S. C. § 1857c-8(c)(1) which provides as follows:

"(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Fed-

erally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a) of this section, or

(C) violates section 1857c-6(e) or section 1857c-7(c) of this title.

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both."

3. The compliance order here in question is reviewable under 5 U. S. C. § 704, which provides as follows:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

4. The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

5. Statutes upon which petitioner relies to show the primacy of State authority under the Clean Air Act are 42 U. S. C. § 1857c-2(a), which provides as follows:

> "(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

and 1857c-5(a)(1), which provides as follows:

> "(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary

standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides, for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph."

6. The requirement that the respondent shall comply with the "environmental impact statement" requirements of the National Environmental Policy Act is set forth at 42 U. S. C. § 4332(2)(C):

"§ 4332. *Cooperation of agencies; report; availability of information; recommendations; international and national coordination of efforts*

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes."

STATEMENT OF THE CASE.

On March 6, 1972, respondent, William G. Ruckelshaus, Administrator of the Environmental Protection Agency, issued a formal notice, under 42 U. S. C. § 1857c-8(a)(1) (Clean Air Act, § 113(a)(1)) advising Delmarva Power and Light Company that it was in violation of Regulation XV (subsequently renumbered as and hereafter referred to as Regulation VIII) of the Delaware State Implementation Plan. That Regulation prohibited the burning of fuel having a sulfur content by weight in excess of 3.5 percent on and after January 1, 1972. After an informal conference on March 20, 1972, the Administrator issued an order on April 17, 1972, requiring Delmarva Power and Light Company,[1] the alleged violator, to comply with the applicable regulation (A1).

Petitioner promptly instituted a lawsuit in the District Court for the District of Delaware on April 21, 1972, seeking an injunction against enforcement and a stay of the effective date of the compliance order. The jurisdiction of the District Court was invoked because of the questions arising under the Administrative Procedure Act, the Clean Air Act, the National Environmental Policy Act, and 28 U. S. C. § 1337. At the request of the District Court, the respondent deferred the effective date of its compliance

1. Although Delmarva Power and Light Company is named as the alleged violator, it is not the real party in interest. A somewhat unique contract between Delmarva and petitioner requires, inter alia, that Delmarva utilize as its sole fuel source the fluid coke which is the by-product of the refinery at Delaware City owned and operated by petitioner. In return, Delmarva is obligated to supply the preponderance of the electricity and steam generated by the burning of the coke to the refinery. Any increased cost resulting from a legal requirement that Delmarva burn a fuel other than the fluid coke is borne by petitioner under the contract, and by the public users of electricity to the comparatively lesser extent that power is furnished to them. Consequently, petitioner, and not Delmarva, is the "aggrieved party", and therefore the real party in interest.

order until midnight on May 10, 1972. On May 10, 1972, the Court rendered its decision denying a temporary restraining order (A6) and thereafter, on May 12, 1972, similarly denied on the same record petitioner's request for a preliminary injunction (A5). Petitioner promptly filed a notice of appeal with the Third Circuit Court of Appeals, together with a motion in the District Court for an injunction pending appeal. The District Court denied a full injunction pending appeal, but granted a limited injunction until petitioner could present its application for an injunction pending appeal to the Third Circuit. On May 25, 1972, the Third Circuit Court of Appeals granted petitioner's motion for an injunction pending appeal by continuing in full force and effect the injunction theretofore granted by the District Court in paragraph 2 of its May 12, 1972, order. Following an abbreviated brief schedule, petitioner's appeal from the decision of the District Court came on for hearing before the Third Circuit on June 23, 1972. On September 12, 1972, the Third Circuit entered its judgment and upon motion timely made by petitioner, on October 2, 1972, entered an order staying the issuance of its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

The pertinent facts of this case are not in dispute. Petitioner operates a large crude oil refinery at Delaware City, Delaware. A natural byproduct of its refining operations is high energy fluid coke, which is manufactured at a maximum rate of 1,500 tons per day. The coke, which has a sulfur content of up to between 6 and 7 percent by weight, is transferred by conveyor to an adjoining power station operated by the Delmarva Power and Light Company, where it is burned to produce electricity and steam. All of the steam not used in generating electricity and most of the electricity is then returned to the refinery; the remainder is sold by Delmarva to the public. Apart from its

use as a valuable fuel source at Delaware City, fluid coke has practically no market or product application. If the coke cannot be burned, petitioner would be required to either stockpile it, dispose of it at sea, or otherwise get rid of it.

While Regulation VIII would permit the burning of coke if its emissions could be controlled to the level of emissions from fuel having a sulfur content of less than 3.5% by weight, no such technology exists. In an effort to develop such technology, petitioner has devoted thousands of man hours and over $800,000.00 to a search for such a solution. While immediate compliance is possible by burning low sulfur fuel oil, such compliance is unreasonable in the light of the uncontested facts of record here that (1) the National Primary Standard is already being met in Delaware and, hence, the "violation", even if one has occurred, is not serious and (2) the cost of immediate compliance of more than $10,000.00 per day during 1972 is ruinously high and (3) compliance would cause low sulfur fuel oil, already in scarce supply, to be burned where not needed and would result in a misallocation of national resources and have undesired adverse environmental side effects, all contrary to the dictates of NEPA.

Based on these salient facts, petitioner sought a variance from Regulation VIII before the Secretary of Natural Resources and Environmental Control of Delaware. That variance was denied, not on the merits, but on the ground that the Secretary lacked the authority to grant the requested variance. The appeal of that decision was argued on June 26, 1972, and is now pending before the Water and Air Resources Commission of Delaware ("WARC"), which initially promulgated Delaware's Implementation Plan, and which is vested with the authority to amend it. The Delaware Court of Chancery granted a temporary restraining order to petitioner against enforcement by the State until the WARC decides the variance appeal.

REASONS FOR GRANTING A WRIT.

1. This Case Raises Important Questions Under the Clean Air Act and the National Environmental Policy Act as Well as the Administrative Procedure Act Which Should Be Settled by This Court.

This case is the first appellate review of enforcement under the Clean Air Act (42 U. S. C., Chapter 15B). As such, if allowed to stand, it will have a far reaching effect on environmental regulation in this country and on appellate review thereof. In its landmark decision, the Court of Appeals decided that the District Court is without jurisdiction to review an enforcement order by the Administrator of the Environmental Protection Agency under § 113(a)(4) of the Act (42 U. S. C. § 1857c-8(a)(4)). It reached this decision despite the facts that petitioner had not been afforded a due process hearing on the order and noncompliance with the order carries criminal penalties of up to $25,000 per day or imprisonment for up to one year or both. 42 U. S. C. § 1857c-8(c)(1).

Another important question which the Court of Appeals decided was that the provisions of the National Environmental Policy Act calling for a multi-discipline, interdepartmental study of the environmental effects of major federal action, may be disregarded if not raised within thirty days of approval of a State Implementation Plan in the Court of Appeals. 42 U. S. C. § 1857h-5(b)(1). Further, the Court held that NEPA was not applicable to the major federal action of enforcement against a major discharger.

The decision of the Court of Appeals in this case eviscerates those provisions of the Clean Air Act which place the major burden on the states for enforcement and regula-

tion of dischargers within the states. In this case, the pendency of state administrative proceedings for a variance and the existence of a state injunction against enforcement were brushed aside, although federal standards in the form of national primary standards had already been achieved in Delaware more than three years prior to the federal deadline for achieving them and the federally approved Implementation Plan included approval of the state variance procedure.

The decision by the Court of Appeals will have an immediate and far reaching effect on federal enforcement efforts in quite another and undesirable way in that the Court of Appeals has held in effect that the Administrator has no discretion under § 113(a)(4) to fix a reasonable compliance schedule, but must inflexibly order immediate compliance. The Court reached this surprising conclusion despite the clear language of the statute which commands that the Administrator shall:

> ". . . specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

The Court of Appeals decision ignored the fact that petitioner was not attacking the regulation, but rather was challenging the reasonableness of the time for compliance set by the Administrator based on the lack of seriousness of the violation and petitioner's good faith efforts to comply. There is no conceivable way that the compliance order could have been reviewed prior to its issuance by challenging the regulation.

The Court's decision in this case deprives the EPA of the power to enter into compliance orders such as it did in a companion case to Getty's appeal. In its order of July 18, 1972, with respect to Allied Chemical Corporation

(A54), the EPA granted Allied more than 14 months from the date of its order to comply. The Allied variance request was denied in the first instance by Delaware's Secretary of Natural Resources and Environmental Control in the same decision in which he denied Getty's request. If the Administrator has no discretion, then he will not be able to do this in the future and the Allied order is illegal. If he has discretion, then Getty should be able to review an abuse of that discretion under the Administrative Procedure Act, 5 U. S. C. §§ 704 and 706.

2. The Decision by the Court of Appeals for the Third Circuit Conflicts With the Decisions of This Court and With Decisions in Other Circuits in Several Important Respects.

On the threshold question of jurisdiction, the Court of Appeals decision herein clearly conflicts with this Court's decision in *Abbott Laboratories v. Gardner*, 387 U. S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Although the Court of Appeals paid lip service to *Abbott*, it failed to show any legislative intent to preclude review of compliance orders and in its recitation of the complicated procedural background of this case, it was, of course, unable to show any other proceeding in which the compliance order could have been tested. Hearings which were available on the desirability of the regulation did not afford petitioner review of the discretionary compliance order or of the reasonableness of the compliance schedule. Hence, petitioner is entitled to review pursuant to this Court's decision in *Abbott* under the APA.

The decision of the Court of Appeals also conflicts with due process decisions of this Court, including recent decisions. *Ex parte Young*, 209 U. S. 123, 188 S. Ct. 441, 52 L. Ed. 714 (1908); *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 64 L. Ed. 596 (1920); *Natural Gas Pipeline Co.*

v. Slattery, 302 U. S. 300, 58 S. Ct. 199, 82 L. Ed. 276 (1937); *St. Regis Paper Co. v. United States,* 368 U. S. 208, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961), reh. den. 368 U. S. 972, 82 S. Ct. 437, 7 L. Ed. 2d 401. Where criminal penalties attach to an administrative order, a due process hearing must be afforded a litigant prior to the litigant becoming liable for those penalties.

There are certain instances, of course, where summary adjudication may be justified. This Court has held that the strict guarantee of due process may be relaxed where the particularized circumstances of a given case provide some overriding ground for summary compliance with an administrative order. *Sniadach v. Family Finance Corp.,* 395 U. S. 337, 89 S. Ct. 820, 23 L. Ed. 2d 349 (1969), *Fuentes, et al. v. Shevin, et al.,* 40 U. S. L. W. 4692 (U. S. June 12, 1972), and *Parham, et al. v. Cortese, et al.,* 40 U. S. L. W. 4692 (U. S. June 12, 1972). The undisputed facts before this Court, however, reflect no particularized or special circumstances which might sustain the deprivation of a due process hearing; indeed, all evidence of record reflects precisely the opposite of this conclusion. As both the Third Circuit Court of Appeals and the District Court found, a stay of compliance in this case pending the grant of an evidentiary hearing involves no threat whatsoever to the public health or safety. Hence, the Court of Appeals decision, which would deny petitioner a due process hearing and protection against the imposition of criminal penalties if its challenge fails, conflicts with a long line of decisions of this Court.

This Court has not yet passed on the National Environmental Policy Act or its interaction with the Clean Air Act. The lower court's decision herein, however, conflicts with decisions interpreting NEPA which have been decided in other circuits. In *Environmental Defense Fund v. Hardin,*

325 F. Supp. 1401 (D. D. C. 1971), the Court concluded that NEPA provided an independent jurisdictional ground for review of administrative action and that the requirements of NEPA could not be dispensed with because of the existence of provisions for "exclusive review" by the Court of Appeals of any order under the Federal Insecticide Act. 7 § 135b(d). 325 F. Supp. 1401 at 1407. This is in conflict with the decision here. See also, *SCRAP v. U. S.*, 4 E. R. C. 1312 (D. D. C. 1972), petition for certiorari filed, sub nom., *Aberdeen R. R. v. SCRAP*, 4 E. R. C. 1369 (U. S. July 19, 1972, Nos. A-72 and A-73, probable cert. noted, memorandum opinion, Burger, C. J., July 19, 1972) at 1317:

> "It is unnecessary for us to decide whether the Commission has here injected itself sufficiently into the rate making process to bring this case within the *Moss* rule, however, since there is another, more compelling, argument for why this court possesses jurisdiction. In our view, NEPA implicitly confers authority on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements, even if jurisdiction to review this action is otherwise lacking. Thus no one would contend that this or any court possesses independent jurisdiction to assess the wisdom of a presidential decision to conduct a nuclear test. But when such a test was challenged because of a failure to comply with NEPA, the Court of Appeals for this circuit nonetheless assumed jurisdiction 'to determine whether the agencies involved have fully and in good faith followed the precedure contemplated by Congress * * *.' *Committee for Nuclear Responsibility, Inc. v. Seaborg*, — U. S. App. D. C. —, — F. 2d — [3 ERC 1126] (No. 71-1732, decided October 5, 1971) (slip opinion at 6)."

In *NRDC v. Morton*, 3 E. R. C. 1558 (D. C. Cir. 1972), the Court of Appeals held that NEPA's requirements must be met both at the policy-making stage and at the implementation stage. *See also, Green County Planning Board v. FPC*, 455 F. 2d 412, at 420 (2d Cir. 1972). Applied to this case, that would mean, as we contended, that the requirements of NEPA must be met when the Administrator considers the alternatives open to him in fixing a reasonable compliance order under 42 U. S. C. § 1857c-8(a).

The record in this case reflects the wisdom of Congress in imposing this requirement. For in this case, the Administrator ignored the waste of 1,500 tons per day of high energy fuel at a time of critical fuel shortage; he ignored the adverse environmental effects from transporting and disposing of this massive quantity of coke; he ignored the adverse environmental effects of requiring up to 7,000 barrels per day of low sulfur fuel oil to be burned in this area of the country which already meets the national primary standards, when, as a consequence, such fuels will not be available to meet more critical needs elsewhere.

The Court of Appeals in this case found that,

> "To require an impact statement at the enforcement stage would do substantial harm to the Congressional purpose of obtaining expeditious compliance with primary and secondary air standards." (A53)

This conflicts with the policy balance struck by other Courts of Appeals in favor of NEPA's requirements which, of course, had the effect of slowing down other Congressional programs. See, e.g., *NRDC v. Morton, supra; National Helium Corp. v. Morton*, 455 F. 2d 650 (10th Cir. 1971); *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F. 2d 1109 (D. C. Cir. 1971). See also, *Kalur v. Resor*, 335 F. Supp. 1 (D. D. C. 1971), in which Mr.

Ruckelshaus was a named defendant. The Court's finding on this also conflicts with the unrebutted evidence in the record that the National Primary Standards with respect to sulfur dioxide emissions have already been achieved in Delaware.

> "Compliance to the *'fullest'* possible extent would seem to demand that environmental issues be considered at every important stage in the decision-making process concerning a particular action—at every stage where an overall balancing of environmental and non environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental cost." *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,* 449 F. 2d at 1118 (D. C. Cir. 1971).

So here, where the gut issues surrounding the possibility of an adverse environmental impact come into focus for the first time when the Administrator proposes to issue a compliance order, where the Administrator has broad discretion in establishing a reasonable compliance date on the basis of the seriousness of the violation and the good faith efforts of the party to comply, and where the Administrator failed to prepare an environmental impact statement with respect to his approval of the Delaware implementation plan ab initio.

The Court of Appeals seeks to absolve the EPA from NEPA's requirements on the grounds of its own self-serving regulations and those of the Council on Environmental Quality. Of course, this conflicts with the Second Circuit's decision in *Green County Planning Board v. Federal Power Commission,* 455 F. 2d 412 (2d Cir. 1972), which found such regulations had no binding effect. 455 F. 2d at 421. See also, *Kalur v. Resor, supra.*

CONCLUSION.

Because of the important questions of federal law which should be resolved by this Court and the conflict of the Third Circuit's opinion in several important respects with decisions of this Court and of other Circuits, petitioner respectively requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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Getty Oil Company
(Eastern Operations), Inc.

Appendix.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C.

DOCKET NO.: 293-113-7201.

IN THE MATTER OF
DELMARVA POWER & LIGHT COMPANY
DELAWARE CITY, DELAWARE
PROCEEDING UNDER § 113(a), CLEAN AIR ACT, AS AMENDED.

ORDER.

AND Now, this 17th day of April 1972, the following ORDER is issued pursuant to Section 113(a)(1) of the Clean Air Act, as amended, 42 U. S. C. § 1857(c)-8(a)(1) (hereinafter referred to as the "Act").

WHEREAS, on March 6, 1972, the Administrator found that Delmarva Power & Light Company (Delmarva) was in violation of Regulation XV (now renumbered Regulation VIII) of the Delaware Water & Air Resources Commission (a requirement of an "applicable implementation plan" as that term is used in Section 113(a)(1) of the Act), in that Delmarva was burning, at its Delaware City, Delaware power station, fuel with a sulfur content in excess of 3.5% by weight; and

WHEREAS, pursuant to Section 113(a)(4) of the Act, opportunity to confer with representatives of Environmental Protection Agency was given to Delmarva and on March 20, 1972, a conference to discuss this violation was held at the offices of Region III of the Environmental Protection Agency; and

WHEREAS, this violation has continued beyond the 30th day after the date of the Administrator's notification; and

WHEREAS, after review of the conference record and a thorough investigation of all relevant facts, including the seriousness of the violation and any good faith efforts to comply, it has been determined that immediate compliance with said Regulation VIII is reasonable; it is hereby

ORDERED.

1. That on and after Midnight May 10, 1972, Delmarva Power & Light Company comply with said Regulation VIII by burning no fuel (or fuel mixture), on any day or portion of a day, which fuel has a sulfur content which exceeds 3~~5~~% by weight.

2. That on or before May 10, 1972, Delmarva Power & Light Company certify in writing to the Regional Administrator of Region III of the Environmental Protection Agency the steps it will take or has taken to comply with paragraph 1 of this Order.

3. That commencing June 5, 1972, and continuing thereafter until further Order of the Environmental Protection Agency, Delmarva Power & Light Company, on or before the 10th day of each month, certify, in writing, to the Regional Administrator of Region III of the Environmental Protection Agency, the average sulfur content of

the fuel by weight burned on each day during the preceding calendar month.

RICHARD P. NALESINK,
for
EDWARD W. FURIA,

Regional Administrator
Environmental Protection
Agency.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE.

CIVIL ACTION No. 4366.

GETTY OIL COMPANY
(EASTERN OPERATIONS), INC.

A DELAWARE CORPORATION,

Plaintiff,

v.

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

ORDER.

Plaintiff having filed a motion for a Temporary Restraining Order staying the effect of a compliance order issued by the Administrator of the Environmental Protection Agency, and the matter having been argued, briefed and considered,

It is ORDERED in conformance with the Court's opinion of May 10, 1972 that the motion for Temporary Restraining Order is hereby denied.

/s/ WALTER K. STAPLETON, *J.*

Dated: May 10, 1972.

IN THE

UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

C. A. No. 4366, 1972.

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., A DELAWARE CORPORATION,

Plaintiff,

v.

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

ORDER.

WHEREAS, the plaintiff, Getty Oil Company (Eastern Operations), Inc., presented its motion for a preliminary injunction in the above-captioned case and relied on the papers previously filed in support of its application for a temporary restraining order;

NOW, THEREFORE, IT IS ORDERED, for the reasons set forth in the Court's opinion of May 10, 1972, that the application for a preliminary injunction is hereby denied.

/s/ WALTER K. STAPLETON,
Walter K. Stapleton,
District Ct. Judge.

Dated: May 12, 1972.

UNITED STATES DISTRICT COURT

D. DELAWARE

CIV. A. No. 4366.

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., A DELAWARE CORPORATION,

Plaintiff,

v.

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

May 10, 1972.

Supplemental Opinion May 10, 1972.

OPINION.

STAPLETON, *District Judge.*

This action seeks (1) preliminary and permanent orders staying the effect of a compliance date set forth in a compliance order issued by the Administrator of the Environmental Protection Agency (the "Administrator") pursuant to Section 113 of the federal Clean Air Act as amended by the Air Quality Act of 1967 and the Clean Air Act amendments of 1970 (42 U. S. C. § 1857 et seq.) ("the Clean Air Act") and (2) a declaratory judgment that this compliance order is null and void. The case is currently before me on plaintiff's motion for a temporary restraining

order. Except to the extent otherwise indicated below, the relevant facts are not in dispute.

Since 1956, plaintiff Getty Oil Company (Eastern Operations), Inc. ("Getty") and its predecessors in interest have operated a large oil refinery in Delaware City, New Castle County, Delaware. One of the products of this oil refinery is fluid petroleum coke. When operating at capacity, the refinery produces approximately 1,500 tons per day of this black, sand-like substance. Coke is a high energy fuel with heat generating characteristics. In order to make use of this fuel, Getty decided to utilize the coke to supply a large portion of the energy requirements of the refinery. Accordingly, a power station was constructed in conjunction with the refinery and designed to burn fluid coke along with either fuel gas or oil. This power station is operated by Delmarva Power & Light Company ("Delmarva"). Delmarva's power station burns the fluid coke under a long term contract with Getty and supplies all of the electricity and steam requirements needed to operate the refinery. The station also generates electricity for Delmarva's power grid at Delaware City.

In September of 1970 Delaware's Water and Air Resources Commission (the "Commission") noticed and held a public hearing on proposed air pollution regulations for the State of Delaware. Getty appeared at the hearing and argued against adoption of a proposed regulation which would have the effect of limiting the sulphur content in fuel burned at Delfarva's power plant to 3.5% after January 1, 1972. Thereafter, on October 13, 1970, the Commission adopted Regulation XV, Section 2.4 (the "Regulation") providing that "after January 1, 1972, fuel having a sulphur content greater than three and five-tenths percent (3.5%) by weight shall not be utilized in the area south of U. S. Route 40 in New Castle County for fuel burning equipment

having a maximum rate of heat input equal to or greater than 500,000,000 b.t.u. per hour." Since the Delmarva power station is the only establishment having such equipment within the area specified, this regulation presently affects only that installation. Under a regulation simultaneously adopted, facilities with fuel burning equipment having a smaller rate of heat input were limited after January 1, 1972 to the burning of fuel having a sulphur content of 1% or less.

Section 3 of Regulation XV provided an alternative control. It specified that "the sulphur and fuel restrictions of Section 2 shall not apply in any case where it is demonstrated to the Department that the sulphur dioxide emission from any unit of fuel burning equipment will be controlled to sulphur dioxide levels equivalent to the sulphur dioxide emissions that would result by virtue of burning the applicable fuels listed in Section 2 as they apply."

Getty took no appeal to the Delaware state courts attacking the Commission's approval of these regulations on October 13, 1970.[1] They became part of Delaware's Implementation Plan for attainment and maintenance of the primary national standards for sulphur dioxide promulgated by the Administrator under the Clean Air Act. The sulphur dioxide portion of Delaware's Implementation Plan received federal approval on August 4, 1971. While this approval received substantial publicity at the time and presumably came to Getty's attention shortly after the action was taken, notice of the approval was not published in the Federal Register until February 3, 1972.

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1. Section 6012 of Title 7 of the Delaware Code provides that "any person whose interest is substantially affected by any action, order or decision of the Commission" may appeal to the Superior Court of the appropriate county which "shall hear and determine the matter as a suit in law and equity." 7 Del. C. § 6012 as amended effective July 23, 1970.

After the Commission's adoption of the regulation, Getty made an effort to find a technology which would permit compliance, before January 1, 1972, by meeting the terms of Section 3. The search revealed that there is no such technology presently available and that the most promising technologies presently being studied will not enable the Delaware City plant to comply by meeting the alternative control of Section 3 before 1976.

During the summer of 1971, Getty determined that, "since the quality of air in New Castle County, Delaware was very good and [already] met the national primary standard for sulphur dioxide," it should apply for "a variance" from the effect of the regulation pursuant to Delaware's air pollution control statute. 7 Del. C. § 6007. While the proposition is disputed, Getty had submitted competent expert testimony by way of affidavit that the available data collected by air monitoring stations during the last eleven years pertaining to the ambient air concentrations of sulphur dioxide in New Castle County, with one minor exception, show full compliance with the national primary standards for sulphur dioxide. Getty's expert further expresses the opinion, currently uncontradicted in the record, that "there exists no danger whatsoever to the public health from the existing levels of sulphur dioxide in the ambient air in New Castle County, Delaware."

On September 28, 1971, Getty applied for a variance with the Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware (hereafter the "Secretary" and the "Department", respectively). On December 28, 1971, the Secretary denied Getty's application. He determined that if the variance were granted compliance with the national sulphur dioxide primary standard would be achieved no earlier than late 1975 or early 1976 and that the granting of the variance

was precluded by the federal statute and regulations. He denied "a stay" pending an appeal of his decision to the Commission as provided by Delaware law. 7 Del. C. § 6008. Getty's appeal is currently pending before that body.

Having unsuccessfully applied to both the Department and Commission for a stay of the effect of the regulation, Getty instituted an action against the Secretary in the Court of Chancery in and for New Castle County on December 29, 1971. That court entered a temporary restraining order restraining enforcement of the regulation by the Secretary and the Commission "until further order of the court." This temporary restraining order is still in effect. While there has been no formal disposition of Getty's motion for a preliminary injunction, the Vice Chancellor has recently denied an application of the Secretary to vacate the restraining order.

Since approval by the Environmental Protection Agency ("EPA") of Delaware's Implementation Plan no petitions for review of the Administrator's action have been filed pursuant to Section 307(b)(1) of the Clean Air Act by Delmarva, Getty or any other party.

On February 14, 1972, the EPA sent a certified letter pursuant to Section 114(a) of the Act to Delmarva. The letter requested information dealing with the sulphur content of fuel burned by Delmarva at its Delaware City plant. The data provided in response revealed that the total content of sulphur by weight exceeded 3.5% during the month of January. Updated information thereafter submitted by Delmarva demonstrated that the same situation existed in February and March of 1972. On the basis of Delmarva's admissions, the Administrator of the EPA, pursuant to Section 113(a)(1) of the Clean Air Act, determined that a requirement of an applicable implementation plan had been violated. The Administrator notified Del-

marva of this violation by registered letter dated March 6, 1972. A conference was held on March 20, 1972. On the basis of admissions then made by Delmarva, together with Delmarva's continuing submissions under Section 114(a)(1), it was determined that a violation of the regulation did exist, and that said violation has continued beyond the thirtieth day after the date of the Administrator's March 6, 1972 letter. On April 17, 1972 the Administrator, pursuant to Section 113(a)(1) of the Act, issued the order which is the subject of this proceeding directing compliance by May 1, 1972. This suit was filed on April 21, 1972 and a hearing on Getty's application for a temporary restraining order was held on April 27, 1972. Thereafter, the Administrator voluntarily agreed to suspend the effectiveness of the compliance date until May 10, 1972 in order to allow the Court more time to consider the issues briefed and argued by the parties.

Delmarva joined in Getty's application for a variance. While it is not a party here, an affidavit of its chief executive officer has been filed stating that Delmarva intends to comply with the Administrator's order "unless relieved of compliance by an order of this Court pursuant to the application of Getty Eastern, and will not run the risk of incurring criminal fines and jail sentences which might be imposed if it did not comply." According to the Delmarva affidavit "substantially all of the increased cost resulting from the requirement . . . that Delmarva Power & Light Company burn fuel at its Delaware City power station having a sulphur content by weight of no more than 3.5% will be passed on by Delmarva Power & Light Company to its public customers and Getty Eastern." Getty's share of the increased cost will amount to approximately $10,000 per day.

When analyzing the respective arguments of the parties with respect to jurisdiction, it is necessary to keep in mind the grounds which Getty asserts as a basis for affirmative relief. Getty here attacks both the regulation and the Section 113 compliance order. While Getty expressly disavows any claim that the regulation is invalid as a "generally applicable regulation," Getty does allege that it is "arbitrary and unreasonable *in its application to plaintiff* and that its enforcement *as to plaintiff*[2] would be in violation of the requirements of the Fourteenth Amendment to the Constitution of the United States." This assertion is not further elaborated in the complaint. As I understand it, however, the arbitrariness and unreasonableness of the regulation result from the alleged facts (1) that the national primary standards for sulphur dioxide have already been achieved in New Castle County and the regulation is accordingly wholly unnecessary to achieve and maintain that standard, and (2) that compliance with the regulation at least prior to developments of an alternative control technology would impose an unreasonable hardship on Delmarva and Getty. In connection with this latter point Getty asserts that it has applied for a variance on the basis of this hardship and that enforcement of the regulation prior to a determination of its appeal from the Secretary's denial of a variance would deprive it of procedural due process.

With respect to the compliance order Getty claims that it is "unwarranted by the facts, arbitrary and capricious," and "otherwise unlawful." Its enforcement prior to a "due process hearing" in this Court would also, Getty claims, "constitute the taking as property without due process of law." Finally, Getty asserts that the compliance order is invalid because it was issued in violation

2. Emphasis supplied.

of the National Environmental Policy Act ("NEPA"), 42 U. S. C. § 4321 et seq.[3]

The Administrator denies these propositions and further asserts (1) that Getty has no standing to raise them and (2) that this Court is without jurisdiction to pass upon them.

I have concluded that plaintiff does have standing to bring this action[4] and that this Court has jurisdiction to pass upon the issues presented under 28 U. S. C. § 1337 and the Declaratory Judgment Act (28 U. S. C. § 2201), as well as under the Administrative Procedure Act ("APA"), 5 U. S. C. § 701 et seq. *unless, and except to*

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3. In order to keep the length of this opinion within reasonable limits, I have enumerated and hereafter discuss only Getty's principal arguments in support of the relief sought. I have considered Getty's other contentions and find them to be without merit. I deem it necessary to comment on only one. The compliance order was not issued in violation of the temporary restraining order of the Court of Chancery because the Administrator was not a party in the Chancery action and neither was nor could be included in its scope. Chase National Bank v. City of Norwalk, 291 U. S. 431, 436, 54 S. Ct. 475, 78 L. Ed. 894 (1934); Alemite Mfg. Corp. v. Staff, 42 F. 2d 832 (2nd Cir. 1930).

4. Delmarva would have standing. Abbott Laboratories v. Gardner, 387 U. S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). While the standing of Getty presents a more debatable question, I find that its position and economic stake are such as to meet the applicable criteria under the more recent Supreme Court cases. See Sierra Club v. Morton, 405 U. S. —, 92 S. Ct. 1361, 31 L. Ed. 2d 636 decided April 19, 1972; Barlow v. Collins, 397 U. S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970). It is undisputed that Getty will bear an economic burden of $10,000 per day through increased rates for its energy requirements. For this reason, Getty is in a position similar to the parties found to be "aggrieved" by administrative action in Lynchburg Gas Company v. Federal Power Commission, 119 U. S. App. D. C. 23, 336 F. 2d 942 (1964) and United States v. Public Utilities Commission, 80 U. S. App. D. C. 227, 151 F. 2d 609 (1945). See also Davis, Administrative Law, § 22.12. With respect to Getty's standing to raise its NEPA argument see National Helium v. Morton, 455 F. 2d 650 (10th Cir. 1971).

the extent that, the Clean Air Act precludes review.[5] Accordingly, I turn to that Act.

Section 110(a)(1) of the Clean Air Act provides that "each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard . . . a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State." If the Administrator determines that a state's implementation plan meets the requirements of the federal statute and has been adopted by the state after reasonable notice and public hearings, he must approve the plan within four months after submission. Section 307(b) of the Act provides in part as follows:

> "(1) . . . A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

While there is some dispute about the effective date of the Administrator's approval, Getty maintains, with

5. General Motors Corporation v. Volpe, 321 F. Supp. 1112 (D. Del. 1970), modified, 457 F. 2d 922 (3rd Cir. 1972).

substantial justification, that it became effective on February 3, 1972 when notice thereof was first published in the Federal Register. Getty filed no review action under Section 307 within the allotted 30 days.[6] While paragraph (2) quoted above refers only to enforcement proceedings it clearly evidences a congressional intent that matters which can be raised in a Section 307 review proceeding shall not be litigated elsewhere. Accordingly, this Court cannot review any question which Getty could have raised in such a proceeding.

It seems clear that judicial determination of an attack on the validity of a compliance order not based upon the invalidity of the underlying regulation is not expressly precluded by Section 307. On the other hand, it would appear that attacks upon the Administrator's approval of a regulation are precluded if not asserted in a Section 307 review proceeding. Getty acknowledges that this is true as to attacks upon a regulation as "invalid on its face" or as unlawful as a "generally applicable regulation," but asserts that it is not true with respect to an allegation of an affected party that the regulation is "invalid as applied to him." If there is any merit to this distinction, I do not think that it can apply quite so broadly as Getty suggests.

The text of the last sentence of Section 307(b)(1) makes it clear that Congress did not intend to limit Section 307 review to cases where the Administrator's approval of a regulation is challenged on grounds that the procedure followed did not comply with the statute, that the Administrator exceeded his statutory authority, or that the regulation is otherwise void on its face. Such grounds would always exist upon the date of the approval and the last clause con-

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6. None of the facts relied upon by Getty in its present attack upon the regulation occurred after the thirtieth day.

templating grounds arising after 30 days would have no conceivable application.[7]

Moreover, a party must have standing to secure judicial review and in a very real sense any challenge to the validity of a regulation is a challenge to the regulation as applied to the objecting party. In the instant case, Getty's argument that the regulation is wholly unnecessary because the national primary standard has already been achieved in New Castle County is a contention which anyone affected by the regulation could raise and is not personal to Getty in any way. Nor does Getty's "arbitrary and unreasonable" argument change its basic character when Getty adds that along with being unnecessary the regulation is also very costly. Getty could have argued at the hearing and on review under Section 307 that the economic burdens imposed by the regulation when compared to environmental benefits render the regulation wholly arbitrary.[8] Congress intended to have such challenges disposed of as soon as possible after the Administrator's approval. Having failed to avail itself of the opportunity provided, Getty cannot now complain.[9]

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7. This concluding clause is not explainable as being applicable to an Administrator's approval of revisions of an implementation plan. They either come within the phrase "Administrator's approval of an implementation plan" or they do not. If they do, approval commences a fresh 30 day period under Section 307(b)(1). If they do not that section is inapplicable. In neither event is the presence of the concluding clause explained.

8. The cost to Delmarva and Getty would, of course have been relevant evidence of the economic burdens which the regulation would impose. Indeed, on the facts of this case, the cost to Delmarva and Getty was the only economic burden which would be imposed, at least initially.

9. Getty argues that the Court of Appeals would surely have refused to decide its contention because Getty and Delmarva had not exhausted the possibility of a variance. I am unpersuaded. Congress did not require a variance procedure in the Clean Air Act beyond that provided for in Section 110. It is unlikely that it enacted Section 307 with the idea that challenges to a regulation as "generally applicable" would be taken care of by Section 307 but that challenges

Section 307(b)(1) appears to be an adaptation of a technique previously used by Congress in other regulatory schemes. The National Traffic and Motor Vehicle Safety Act, 15 U. S. C. § 1381 et seq., for example, provides for circuit court review, within sixty days, of an order establishing federal motor vehicle standards. 15 U. S. C. § 1394. Circuit court review proceedings under that act have been considered appropriate vehicles for raising arguments that an approved standard is arbitrary and unreasonable because unnecessary, uneconomic and illsuited to the accomplishment of the objectives of the regulatory program. See Automotive Parts & Accessories Association v. Boyd, 132 U. S. App. D. C. 200, 407 F. 2d 330 (1968). See also American Bond & Mortgage Co. v. United States, 52 F. 2d 318 (7th Cir. 1931) (holding that a constitutional attack on an administrative ruling under the Federal Radio Act, as applied to plaintiff should have been raised in a Court of Appeal review proceeding provided for in the Act.[10]

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9. (Cont'd.)

to a regulation as specifically applied would be relegated a procedure which might or might not be included in the regulations. Moreover, it is unlikely that a court would relegate a party to a variance procedure when, as I have hereafter indicated, any variance if granted by Delaware would not become effective under the federal regulations until approved by the Administrator, thereby exposing Getty to allegedly irreparable injury in the interim.

10. It is true that the Clean Air Act differs from the Motor Vehicles Safety Act and, indeed, in some respects from any other federal regulatory scheme the Court has been able to find and examine. Unlike the Safety Act, it is a cooperative state-federal program and hearings on state implementation plans are held before the Administrator only when the state has not conducted one. Apparently, the Administrator's information resources are ordinarily limited to the record of the state hearing (40 C. F. R. § 51.4(c)), and the data gathered by his agency. Moreover, unlike the Safety Act, "a concise general statement of [the rules] basis and purpose" is not required. Concededly if this Court's view of the congressional intent is correct, the character of the proceedings in a court of appeals' review in a case of this character under Section 307 (a subject to which the Clean Air Act does not speak) may be somewhat different from

The next question is whether the Clean Air Act as a whole, by necessary implication, forecloses pre-enforcement review of issues which could not be raised in a Section 307 review proceeding. We start with the proposition relied upon in Abbott Laboratories v. Gardner, 387 U. S. 136, 141, 87 S. Ct. 1507, 1511, 8 L. Ed. 2d 681 (1967) that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." I conclude that no such contrary legislative intent is here evident, that the question presented is analogous to that presented in the *Abbott Laboratories* case, and that this Court has jurisdiction to entertain non-Section 307 issues raised in a pre-enforcement proceeding.

The text of the Clean Air Act provides no clear indication of an intention to preclude pre-enforcement judicial review. The fact that the Act specifies special judicial review procedures for some issues arising under the Act and not for others does not by itself evidence a legislative intent or preclude review of issues falling in the latter category. Abbott Laboratories v. Gardner, *supra*, at p. 141, 87 S. Ct. 1507.[11] Nor does the legislative history provide the necessary clear evidence.[12]

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10. (Cont'd.)

a court of appeals review under other existing regulatory programs. I am bound to assume, however, that Section 307 review will be implemented in a manner consistent with due process, and Getty, not having pursued the statutory remedy, cannot maintain otherwise. Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

11. Arguably, one could perhaps infer from the fact that Section 307(b)(2) refers only to enforcement actions that Congress had in mind only two types of judicial proceedings, Section 307 review proceedings and enforcement actions. I consider this inference too speculative, however, to override the policy behind the *Abbott Laboratories* presumption.

12. I have carefully considered the numerous government references to the legislative history of the 1970 amendments and find each of them either inapplicable as a comment on proposals not actually enacted into law or as inconclusive evidence of congressional intent.

While there is no dispute in this case that Delmarva is burning fuel with a sulphur content higher than 3.5%, I believe the appropriate perspective from which to decide whether pre-enforcement jurisdiction exists is a case where there is a honest difference of view as to whether a particular establishment is or is not in compliance with an applicable regulation. The government concedes that cases of this character are likely to arise. In such a situation compliance may seriously disrupt a business and impose a heavy economic burden; non-compliance will run the risk of cumulative fines of up to $25,000 per day as well as imprisonment. From this perspective I think it apparent that the courts should not readily imply a congressional intent to preclude pre-enforcement judicial review. I decline to do so.[13]

As in *Abbott Laboratories*, jurisdiction for pre-enforcement review under the Clean Air Act will not delay or impede effective enforcement of the Act. In addition to the other reasons cited in the *Abbott* case, the institution of this type of action does not by itself stay the effectiveness of the challenged order. If application is made for a stay, the government can oppose it by showing that delay would be detrimental to the public health or that one of the traditional prerequisites of preliminary injunctive relief is absent.

A court, having determined that it has pre-enforcement review jurisdiction, must then decide whether it should exercise its discretion in favor of entertaining the case. Gen-

13. While Getty's position is different from that of a party like Delmarva which is subject to cumulating fines, Getty's case for pre-enforcement judicial review is stronger in one respect. Theoretically, Delmarva could fail to comply and test the validity of the compliance order in a criminal enforcement proceeding. Getty would not be a party to that proceeding, however, and would have no right to intervene. This type of proceeding, accordingly, may be Getty's sole vehicle for challenging the compliance order.

eral Motors Corporation v. Volpe, 457 F. 2d 922 (3rd Cir. 1972). As the Supreme Court observed in *Abbott Laboratories, supra,* 387 U. S. at pp. 148-149, 87 S. Ct. at p. 1515:

> ". . . The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution. . . . The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

In terms of fitness of the issues for judicial decision and hardship to the parties, I find this case indistinguishable from the *Abbott* case. The economic impact of compliance and the cumulative daily fines for non-compliance distinguish this case from General Motors Corporation v. Volpe, *supra.*

Accordingly, I turn to the question of whether Getty has presented an appropriate case for the issuance of preliminary relief. The availability of preliminary injunctive relief depends upon four criteria:

> (1) Irreparable harm to the petitioner unless preliminary relief is granted;
>
> (2) Absence of substantial harm to opposing party;
>
> (3) Absence of harm to the public interest; and
>
> (4) A likelihood that the petitioner will prevail on the merits of his case. Nelson v. Miller, 373 F. 2d 474, 477 (3rd Cir. 1967).

It appears from the present record that there will be some irreparable economic injury to Getty if preliminary

relief is denied. The Administrator's interest is synonymous with that of the public. The only evidence of record indicates that there would be no hazard to the public health or safety from a stay of the compliance order pending disposition of this case. While the Administrator correctly points out that the Clean Air Act was adopted by Congress as a health measure and that Congress determined that compliance with the national primary standards is in the interest of public health, he has thus far tendered no evidence that non-compliance with Regulation XV for the next several weeks by this particular source would jeopardize the public health.[14]

The scale is, therefore, weighted to some degree in Getty's favor as we reach a consideration of the likelihood of its success. I agree with Getty that where irreparable injury is shown and the question is in reality the likelihood of success before an administrative body on a technical issue within its administrative expertise, a court may properly grant preliminary relief without finding a probability of success. American Home Products Corporation v. Finch, 303 F. Supp. 448 (D. Del. 1969). As I view this case, however, this principle is not here applicable.

As I have heretofore held, the perhaps difficult issues of the quality of the ambient air in New Castle County and the economic impact of Regulation XV are not properly before this Court. Moreover, there is no dispute whatever that Section 2.4 of Regulation XV is applicable to Delmarva and that Delmarva has been burning fuel which does not

14. I do not here indicate that immediate effect on the public has anything whatsoever to do with the duty of a person to comply with a valid regulation adopted under the Clean Air Act. Congress clearly intended that lack of effect on ambient air from pollution of a particular source would not excuse a failure to comply. This is not an enforcement action, however. It is a suit to enjoin allegedly invalid agency action and the issue now before the Court is whether that action should be stayed pending a judicial determination of its validity.

comply with its requirements. This leaves Getty on the merits with (1) the argument that due process and the Delaware statute require a stay pending determination of the variance appeal, (2) the argument that the Administrator's selection of May 1, 1972 as a compliance date was arbitrary and capricious, and (3) the argument that the compliance order violates the NEPA. For the reasons hereafter set forth, I consider the likelihood of Getty's success on any of these arguments very slim.

1. *The Variance Appeal and Due Process.*

I conclude that the Clean Air Act and the regulations promulgated thereunder provide that no deferral of the applicability of a regulation to a particular source of emissions can be effective until approved by the Administrator, that this forecloses a "stay" of the effect of the regulation pending final determination of Getty's variance application, and that this result does not violate Getty's right to procedural due process.

In the terminology of the statute and regulations, Delaware's Regulation XV is a part of the compliance schedule incorporated in Delaware's Implementation Plan. It has received federal approval and violation thereof is a federal crime enforceable by the Administrator. The federal statute and regulations do contemplate deferrals of the application of such a regulation to a particular source, but only under carefully circumscribed conditions.

Subsection 51.15(d) of the regulations [15] provides as follows:

> "Except as otherwise provided by Subpart C of this part, neither the State agency nor a local agency shall grant any variance of, or exception to, any com-

15. The regulations hereinafter referred to are found in Part 51 of Title 40 of the Code of Federal Regulations.

> pliance schedule included in an applicable plan if such variance or exception will prevent, or interfere with, attainment or maintenance of a national standard within the time(s) specified . . . [in the implementation plan]."

Getty maintains that the variance it has requested will not prevent, or interfere with, attainment or maintenance of a national standard because compliance has already been achieved in New Castle County. The Secretary in acting upon Getty's application determined that such a variance would prevent attainment of the national standard until late 1975 or early 1976, which would be later than the date specified in the plan under any construction thereof.[16] For present purposes, I will assume, without deciding, that Getty's position here is factually correct.

Getty argues that the above-quoted regulation by negative implication indicates that no federal approval is required for a variance or exception which will not prevent attainment or maintenance of the national standard within the time specified. It argues with justification that attainment of the national standard is the Administrator's sole concern and that he is not concerned about state action having a lessor effect. While I agree with Getty's characterization of the Administrator's responsibility, I do not agree with its conclusion.

Subsection 51.15(d) must be read in the context of the regulations as a whole. Subpart C of the regulations deals with extensions. Section 51.32 thereof provides that deferrals up to not more than one year may be granted by the Administrator if requested by the Governor of the State even though the deferral may prevent attainment or main-

16. Getty maintains that the plan specified no date and that by operation of law the pertinent date is February 3, 1975.

tenance of a national standard within the time specified in the plan. Subsection (f) of that section provides as follows:

> "(f) A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under Section 51.6."

Subsection (d) of Section 51.6 provides:

> "Any revision of rules and regulations and of compliance schedules shall be submitted to the Administrator in accordance with § 51.5 within 60 days following its adoption."

Section 51.8 provides:

> "The Administrator shall approve any plan, or portion thereof, or any revision of such plan, or portion thereof, if he determines that it meets the requirements of the Act. Revisions of a plan, or any portion thereof, shall not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part."

The fallacy in Getty's analysis of the regulations is that, while the Administrator's concern is whether the state's plan will meet the national standards, he has a vital interest, precisely because of that responsibility, in the determination of whether a particular deferral will have the effect of preventing attainment or maintenance of the national standard. For this reason, the regulations provide that any deferral of the application of a compliance sched-

ule, whatever its effect, is deemed a revision of the plan which must be submitted to the Administrator for his consideration. Under Section 51.8 he is required to approve it if it will not prevent attainment of the national standards and required to disapprove it if it will have that effect unless it is requested by the Governor and the other conditions of Section 51.32(a) through (g) are met. The importance of the requirement of submission to the Administrator for his consideration is demonstrated by the very case, where there is substantial difference of opinion as to whether the variance requested by Getty will or will not prevent attainment of the national standard within the time specified.

In short, the Administrator is duty bound to enforce an approved implementation plan. Revisions of a plan, including any deferrals of an applicable compliance schedule, do not become a part of an applicable plan until approved by the Administrator. It follows that Delmarva is required by federal law to comply with Regulation XV unless and until a deferral is granted by the state and approved by the Administrator. To the extent, if any, that Section 6008 of Title 7 of the Delaware Code dealing with stays pending appeals to the Commission conflicts with this conclusion based on the federal statute and regulation it is of no effect.

Getty cites no authority for its contention that enforcement of the regulation prior to a determination of its variance application will deny it procedural due process and the court has found none. Under the statutory scheme Getty and Delmarva, as I have previously held, either had or now have an opportunity for judicial determination of the validity of the regulation itself. Accordingly, its enforcement clearly cannot deprive them of procedural due process. What they are now trying to do in the variance proceeding is to persuade the Commission that a better rule

as applied to their situation would not require 3.5% until some later date. Getty and Delmarva may or may not be successful in this effort and the required further effort to persuade the Administrator that such a rule would not prevent attainment of the national standard within the pertinent time period. But the Constitution does not require that they be excused in the meanwhile from complying with the regulation.

2. The May 1, 1972 Compliance Date.

Section 113 of the Clean Air Act provides in part:

"(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

. . .

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compli-

ance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. . . ."

Subsections (b) and (c) of Section 113 as adopted in 1970 provided for the institution of a civil or a criminal action when a person has failed to comply with a compliance order within the time stated. These sections were amended in 1971, however, to also provide for the institution of such proceedings if a violation extends beyond the thirtieth day after the Administrator's notification.

As previously indicated, Getty asserts that the compliance order was arbitrary and unreasonable. In light of the conclusions which I have heretofore reached, the only remaining basis for such an argument is that the Administrator's determination of a compliance date was an abuse of discretion. The government contends that resolution of this issue is wholly unnecessary because the 1971 amendments to the Clean Air Act eliminates the procedure described in Subsection (a)(4) as a prerequisite to enforcement actions. I shall assume for present purposes, however, that the Administrator, having elected to proceed via the compliance order route, is now bound by his election.[17]

It is undisputed that low sulphur fuel is available and that, at the time of the issuance of the order, compliance by May 1, 1972 was feasible. Getty does not suggest that compliance with the regulation on May 1, 1972 would impose any greater or different burden upon it than compliance

17. The Court has found no legislative history concerning the 1971 amendments. They are somewhat puzzling. Subsection (a)(4), in the context of the 1970 Act, seemed to clearly indicate a congressional intent that there be a conference and a compliance date set before the criminal penalties would begin to accrue and before enforcement actions could be instituted. The 1971 amendments do not delete this subsection but do appear to esmasculate it.

three months from now. Its arguments that the May 1, 1972 date was arbitrary and unreasonable would apply to any date prior to the availability of alternative control technology. According to its best estimates this will probably be 1976. This is obviously not the type of consideration which Congress meant the Administrator to consider in setting a compliance date under Section 113(b)(4). Getty's argument here is in reality an attack on the regulation itself. Section 113 is simply not an appropriate vehicle under the statute scheme for attacking a regulation or securing a variance. If reviewable at all, the determination by the Administrator of a compliance date under Section 113(b)(4) is reviewable only for an abuse of discretion. Getty has come forward with no fact which would indicate that he abused his discretion in this instance.

3. *The Applicability of NEPA.*

Getty argues that enforcement of the compliance order should be stayed because of the EPA's failure to file an environmental impact statement under the National Environmental Policy Act of 1969 ("NEPA"), 42 U. S. C. § 4321 et seq. (Supp. 1972). Section 102(2)(C) of NEPA, 42 U. S. C. § 4332(2)(C) provides:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human

environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;"

It is conceded that no impact statement was filed in connection with the issuance of the compliance order.

Apart from legislative recommendations, Section 102 (2)(C) is only applicable to "*major Federal actions* significantly affecting the quality of the human environment."

(Emphasis supplied). Therefore, whether the EPA was bound to file an impact statement depends upon whether or not the compliance order was a major action affecting the environment within the meaning of the NEPA. See Scherr v. Volpe, 336 F. Supp. 886 (D. Wis. 1971). Getty argues that issuance of the compliance order was the type of federal action requiring an impact statement because it results in inefficient utilization of natural resources and creates an environmental problem by requiring disposal of substantial quantities of coke. Here, once again, Getty misinterprets the nature and scope of a decision to issue a compliance order under Section 113.[18]

I assume for present purposes, contrary to the Administrator's contention, that the NEPA applies to the EPA.[19] I further assume without deciding that the Administrator's approval of Delaware's Implementation Plan, including Regulation XV, was major action affecting the environment within the meaning of the NEPA. If so, any attack on that approval based on the failure of the Administrator to issue an impact statement prior to his approval would be a matter with respect to which review could have been obtained under Section 307 of the Clean Air Act and cannot now be pressed before this Court.

The purpose of the NEPA is to require federal agencies to consider environmental preservation in their respective spheres of responsibility and, to this end, it prescribes certain procedural measures to ensure that such

18. The Administrator's argument that the 1971 amendment to Section 113 renders the issuance of a compliance order unnecessary as a prerequisite to civil or criminal enforcement proceeding and, therefore, irrelevance does not completely answer Getty's argument here. Getty could make the same argument, if necessary, about the issuance of the notice under Section 113(a) which is still a prerequisite to enforcement. The following comments in the text of this opinion, however, would apply equally to the issuance of such a notice.

19. Kalur v. Resor, 335 F. Supp. 1 (D. D. C. 1971) supports Getty's position on this point.

consideration will in fact be given. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 146 U. S. App. D. C. 33, 449 F. 2d 1109 (1971); Kalur v. Resor, 335 F. Supp. 1 (D. D. C. 1971). The procedures specified clearly indicate that Congress intended such consideration when an agency was in the process of exercising its discretion between two or more alternatives open to it under the controlling law. The impact statement must specify such alternatives.

Here the applicable law provided that no one in Delmarva's position could burn fuel after January 1, 1972 which had a sulphur content by weight in excess of 3.5%. When the compliance order was issued the Administrator had no discretion, absent a lawful revision of the Delaware Plan pursuant to the prescribed procedure, to recognize any other rule of law. To be sure, he had discretion whether to institute enforcement proceedings and, within reasonable limits, when to insist upon compliance. In effect, he had prosecutorial discretion, but no discretion to amend or grant a variance to the law.[20] In such a context, to require the interagency consultation and impact statement stipulated by the NEPA would seriously and unnecessarily impede effective enforcement of the Clean Air Act and similar federal regulatory programs. I conclude that Congress did not intend this result.

Having weighed the relevant criteria, I conclude that under traditional principles of equity this is an inappropriate case for issuance of a temporary restraining order.

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20. The *Kalur* case, relied upon most heavily by Getty, is distinguishable on this ground. The court there held that water quality certifications of the EPA establish a minimum condition for the granting of a permit by the Corps of Engineers under Section 13 of the Rivers and Harbors Act to dispose of industrial refuse in navigable waters. The Corps of Engineers was found to have discretion, above that minimum base, to decide whether the granting of a permit was compatible with environmental concerns. It was, therefore, in a position of exercising its discretion between lawful alternatives.

Only one further issue remains. This Court's denial of a temporary restraining order will result in the enforcement of the compliance order prior to a final judicial determination of the merits of Getty's attack on that order. Citing the cumulative penalties for a failure to obey a compliance order, Getty argues that absent a hearing prior to suffering criminal liability and the accompanying accrual of fines Delmarva will be compelled to acquiesce in the order. This in turn will impose severe economic penalties on Getty before it has had an opportunity to a due process hearing in this Court on the validity of the order. This Getty asserts would be a denial of its right to due process.

The constitutional requirements of procedural due process are neither inflexible nor absolute, Joint Anti-Fascist Comm. v. McGrath, 341 U. S. 123, 162-163, 71 S. Ct. 624, 95 L. Ed. 817 (concurring opinion), and the scope and nature of the procedures demanded are dependent upon a balancing of the precise nature of the governmental function involved and the private interests affected by the governmental action. Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) and Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U. S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). Moreover, when, as here, the issue concerns the timing of judicial review rather than the existance of said review, the procedures which must be afforded to an individual further depend upon the governmental interest in summary enforcement. Goldberg v. Kelly, *supra*.

I have heretofore held that Getty is entitled to litigate its challenge to the validity of the compliance order in this Court. Getty maintains, however, that this remedy, without preliminary relief, is inadequate because of the economic penalty it will be required to pay prior to a final judicial determination of its attack. In support of this contention, Getty relies on several Supreme Court cases

holding that an order triggering penalties so encumbering the judicial process as to render resort thereto infeasible is unconstitutional absent prior judicial review. *E.g.*, Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908); Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 S. Ct. 338, 64 L. Ed. 596 (1920); Natural Gas Pipeline Co. of America v. Slattery, 302 U. S. 300, 58 S. Ct. 199, 82 L. Ed. 276 (1937); and St. Regis Paper Co. v. United States, 368 U. S. 208, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961). To the extent that these cases stand for the proposition that cumulative penalties can, in certain circumstances, make pursuit of judicial remedies so burdensome as to deny due process, this Court is in complete accord with them. However, since as has already been discussed, the requirement of procedural due process in a specific type of case depend on the particularized circumstances of that type of case, this observation constitutes the point of departure for the Court's determination and not conclusive support for the plaintiff's position.

It is clear that not every governmental action which deprives an individual of a property interest must be proceeded by a complete judicial review. Ewing v. Mytinger & Casselberry, 339 U. S. 594, 599, 70 S. Ct. 870, 94 L. Ed. 1088 (1950); Goldberg v. Kelly, *supra; Fahey v. Mallonee,* 332 U. S. 245, 67 S. Ct. 1552, 91 L. Ed. 2030 (1947). The Supreme Court has clearly evinced its conclusion that a valid public interest in summary adjudication will support prejudgment seizures in suits to enforce private liabilities, Sniadach v. Family Finance Corp., 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1968), see also Hahn v. Burke, 430 F. 2d 100 (7th Cir. 1970) and Hall v. Garson, 430 F. 2d 430 (5th Cir. 1970); and in suits to protect the public health and safety, *Ewing, supra,* see also Nor-Am Agricultural Products, Inc. v. Hardin, 435 F. 2d 1151 (7th Cir. 1970).

The *Ewing* case is particularly pertinent to the plaintiff's due process claim. In *Ewing,* the Supreme Court refused to enjoin a series of libel actions commenced pursuant to the determination of the Secretary of the Food and Drug Administration that there was probable cause to believe that the products subject to the condemnation proceedings were mislabeled. The plaintiff argued that to subject it to a series of multiple seizures and the ensuing libel defenses without providing it with the opportunity to obtain judicial review of the Secretary's probable cause finding would constitute a denial of due process. Regarding the due process claim, the court stated:

> "It is said that these multiple seizure decisions of the Administrator can cause irreparable damage to a business. And so they can. The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. See Beavers v. Henkel, 194 U. S. 73, 85 [24 S. Ct. 605, 607, 48 L. Ed. 882]; Ex parte United States, 287 U. S. 241, 250 [53 S. Ct. 129, 131, 77 L. Ed. 283]. The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official

may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. Phillips v. Commissioner [of Internal Revenue], 283 U. S. 589, 596-597 [51 S. Ct. 608, 611, 75 L. Ed. 1289]; Bowles v. Willingham, 321 U. S. 503, 520 [64 S. Ct. 641, 650, 88 L. Ed. 892]; Yakus v. United States, 321 U. S. 414, 442-443 [64 S. Ct. 660, 675, 676, 88 L. Ed. 834].

One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control. It may conclude, as it did here, that public damage may result even from harmless articles if they are allowed to be sold as panaceas for man's ills. A requirement for a hearing, as a matter of constitutional right, does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other. For all we know the most damage may come from misleading or fraudulent labels. That is a decision for Congress, not for us. The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing. We cannot say that due process requires one at that stage." 339 U. S. at 599-600, 70 S. Ct. at 873.

The Supreme Court has exhibited considerable reluctance to interfere with legislative determinations concerning economic regulations, Ferguson v. Skrupa, 372

U. S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). See also Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co., 335 U. S. 525, 536-537, 69 S. Ct. 251, 93 L. Ed. 212 (1949). Moreover, it has cited the particular nature of summary adjudication in the public health and safety area in its recent cases evolving the concept of procedural due process. Boddie v. Connecticut, 401 U. S. 371, 379, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); Sniadach v. Family Finance Corp., 395 U. S. 337, 343, 89 S. Ct. 820, 23 L. Ed. 2d 349 (1969); Goldberg v. Kelly, 397 U. S. 254, 263, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

A holding creating a constitutional procedural due process right to pre-enforcement judicial review would permit any person to delay enforcement by raising even a frivolous challenge to the Secretary's determination. Getty's private interest in continuing to do business as it has done in the past is insufficient to frustrate Congress' desires in its regulation of public health and safety. See Ewing, *supra;* Nor-Am Agricultural Products, Inc., *supra.*

The Court is of the opinion that the proper procedure to utilize in attempting to avoid economic hardship of the character Getty foresees is the stay procedure suggested in *Abbott Laboratories,* 387 U. S. at 156, 87 S. Ct. 1507, 18 L. Ed. 2d 681. See also St. Regis Paper Co. v. United States, 368 U. S. 208, 226, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961). Such a practice permits a court to preclude undue hardship when the facts so merit, but does not straightjacket the Clean Air Act enforcement procedure at the insistence of every recalcitrant polluter. While the *Abbott Laboratories* case was not decided on constitutional grounds, the Supreme Court's concluding comments regarding the availability of preliminary relief in pre-enforcement judicial review proceedings clearly reflects a view that the plaintiff is not constitutionally entitled to a

stay absent evidence which would meet the traditional criteria for such relief. See also General Motors Corporation v. Volpe, 321 F. Supp. 1112 (D. Del. 1970), modified, 457 F. 2d 32[illegible] 3rd Cir. April 5, 1972).

Getty's application for a stay under the APA, 5 U. S. C. § 705, must be judged by the same criteria which control the disposition of its application for a temporary restraining order. Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Commission, 337 F. 2d 221 (6th Cir. 1964); Unglesby v. Zimny, 250 F. Supp. 714 (D. Cal. 1965). For the reasons heretofore set forth, both applications must be denied.

Submit order.

SUPPLEMENTAL OPINION.

On May 12, 1972, Getty's application for a preliminary injunction was heard. In view of the nature of the proceedings on Getty's application for a temporary restraining order, the Court, with the consent of the parties, has considered Getty's second application on the record made in connection with its first application. For the reasons stated in the Court's Opinion of May 10, 1972, Getty's application for a preliminary injunction must be denied.

Submit order.

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 72-1419

GETTY OIL COMPANY (EASTERN OPERATIONS), INC.,

Appellant

v.

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE ENVIRONMENTAL PROTECTION AGENCY

(D. C. Civil Action No. 4366)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE, ROSEN and HUNTER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that this cause be, and the same is hereby remanded to the said District Court with directions to enter an order of dismissal for lack of jurisdiction.

Attest: THOMAS F. QUINN,
Clerk.

September 12, 1972

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 72-1419

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., A DELAWARE CORPORATION,

Appellant

v.

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE ENVIRONMENTAL PROTECTION AGENCY,

Appellees

(D. C. Civil Action No. 4366)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued June 23, 1972

Before HASTIE, ROSEN and HUNTER, *Circuit Judges*

OPINION OF THE COURT.

(Filed September 12, 1972)

ROSEN, *Circuit Judge.*

This appeal is taken from an order of the district court denying applications for preliminary and permanent

injunctions and a temporray restraining order staying the effect of a compliance order issued by the Administrator of the Environmental Protection Agency (EPA). The Administrator issued the order pursuant to Section 113 of the Clean Air Act as amended by the Air Quality Act of 1967 and the Clean Air Act amendments of 1970, 42 U. S. C. § 1857, *et seq.*

Getty operates an oil refinery in Delaware City, New Castle County, Delaware. One of the by-products of its refinery operation is fluid petroleum coke. Delmarva Power and Light Company (Delmarva) operates a power station for Getty. The power station was designed to burn fluid coke along with either fuel gas or oil. Delmarva burns the fluid coke produced by Getty under a long term contract with Getty and thereby supplies the electricity and steam requirements of the refinery.

On October 13, 1970, after a public hearing on proposed air pollution regulations for Delaware was held,[1] the State Water and Air Resources Commission adopted Regulation IX[2] limiting the amount of sulphur content of fuel burned in New Castle County south of United States Route 40 by fuel burning equipment having a maximum rate of heat input equal to or greater than 500,000,000 b.t.u. per hour to 3.5%. The Delmarva power station is the only installation presently operating such equipment in the area.[3]

On August 4, 1971, Regulation IX was approved along with other sections of Delaware's implementation plan by

1. Getty appeared at the hearing and argued against the adoption of a proposed regulation which would have the effect of limiting the sulphur content in fuel burned at Delmarva's power plant to 3.5% after January 1, 1972.

2. The regulation was subsequently renumbered XV. Its present designation is VIII.

3. No appeal was taken to the Delaware State courts from the Commission's action. See 7 Del. C. § 6012.

the Administrator of EPA. As the court below noted in its opinion of May 10, 1972, "[w]hile this approval received substantial publicity at the time and presumably came to Getty's attention shortly after the action was taken, notice of the approval was not published in the Federal Register until February 3, 1972."

Since approval by the EPA of Delaware's implementation plan no petitions for review of the Administrator's action have been filed pursuant to section 307(b)(1) of the Clean Air Act, 42 U. S. C. § 1857h-5,[4] by Delmarva or Getty.

On September 28, 1971 Getty submitted a request to the Secretary of Natural Resources and Environmental Control of the State of Delaware for a "variance" from the January 1, 1972 effective date of the regulation. 7 Del. C. § 6007. The basis for the application was simply that, since the national primary standards for sulphur dioxide

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4. § 1857h-5. ADINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

(a)(1) • • •

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

were already being met in New Castle County, there was no compelling reason why Getty should not be given additional time to meet the emission standards of Delaware's implementation plan.[5] On December 28, 1971, the Secretary denied Getty's application.[6] Getty then took an appeal to the Water and Air Resources Commission (WARC).[7]

On December 29, 1971, Getty instituted an action in the Delaware Chancery Court seeking a temporary restraining order against enforcement of the challenged regulation by the state Secretary pending disposition of Getty's appeal to the Delaware Water and Air Resources Commission. The restraining order was granted on December 30, 1971.[8]

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5. While Delmarva joined in Getty's application for a variance, an affidavit was filed by its chief executive officer in the district court indicating Delmarva's intent to comply with the Administrator's order "unless relieved of compliance by an order of this Court pursuant to the application of Getty Eastern," choosing not to "run the risk of incurring criminal fines and jail sentences which might be imposed if it did not comply."

6. The Secretary determined that if the variance were granted compliance with the national sulphur dioxide primary standard would be achieved no earlier than late 1975 or early 1976 and that the granting of the variance was precluded by the Clean Air Act and federal regulations promulgated thereunder.

7. In a letter to the Commission dated March 13, 1972, Getty requested that argument on its appeal should be deferred pending a determination by the state or federal courts. No further action has been taken by the Commission at this date.

8. On February 3, 1972, the Secretary removed from the Court of Chancery to the U. S. District Court for the District of Delaware the pending question of whether Getty's temporary restraining order should or should not be continued as a permanent injunction. On February 29, 1972, the district court remanded the question to the Court of Chancery. On February 7, 1972, the Secretary commenced an action for a declaratory judgment and an injunction against Getty and Delmarva. On April 7, 1972, the district court dismissed the prayer for an injunction and remanded the case to the Court of Chancery. On March 8, 1972, the Secretary made a motion in that court to vacate or modify the temporary restraining order. The Court of Chancery denied the motion on April 21, 1972.

On February 14, 1972, Region III of the EPA sent a certified letter to Delmarva pursuant to section 114(a) of the Clean Air Act requesting information dealing with the sulfur content of fuel burned by Delmarva during January, 1972. Delmarva submitted the requested data on February 18, 1972, and later updated the information contained in the February 18 letter by submitting data for February and March 1972. For each month the data submitted indicated a violation of Regulation VIII in that the total content of the sulfur by weight exceeded 3.5%. The Administrator notified Delmarva of the violations by registered letter dated March 6, 1972. On March 20, 1972 a conference was held with representatives of the EPA and Delmarva, 42 U. S. C. § 1857c-8(a)(4). Getty requested and was given permission to attend the conference. As a result of the data supplied by Delmarva, the EPA concluded that a violation of the subject regulation had occurred "in that Delmarva was burning, at its Delaware City, Delaware power station, fuel with a sulfur content in excess of 3.5% by weight." The EPA also found that the violation had continued beyond the 30th day after the date of the Administrator's March 6, 1972 letter. On April 17, 1972 the order seeking compliance with Regulation VIII was issued, 42 U. S. C. § 1857c-8(a)(1), fixing May 1, 1972 as the deadline for compliance.[10]

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9. Order of William D. Ruckelshaus, Administrator of the EPA, April 17, 1972.

10. WHEREAS, after review of the conference record and a thorough investigation of all relevant facts, including the seriousness of the violation and any good faith efforts to comply, it has been determined that immediate compliance with said Regulation VIII is reasonable; it is hereby

ORDERED

1. That on and after May 1, 1972, Delmarva Power & Light Company comply with said Regulation VIII by burning no fuel (or fuel mixture), on any day or portion of a day, which fuel has a sulfur content which exceeds 3.5% by weight.

Getty filed this suit on April 21, 1972 and a hearing on its application for a temporary restraining order was held on April 27, 1972. The Administrator voluntarily agreed to suspend the effectiveness of the compliance date until May 10, 1972.

The district judge expressed his conception of Getty's application in this fashion:

> "While Getty expressly disavows any claim that the regulation is invalid as a 'generally applicable regulation', Getty does allege that it is arbitrary and unreasonable *in its application to plaintiff* and that its enforcement *as to plaintiff* would be in violation of the requirements of the Fourteenth Amendment to the Constitution of the United States. (Emphasis in text) • • • As I understand it, however, the arbitrariness and unreasonableness of the regulations result from the alleged facts (1) that the national primary standards for sulphur dioxide have already been achieved in New Castle County and the regulation is accordingly wholly unnecessary to achieve and maintain that standard, and (2) that compliance with the regulation at least prior to development of an alternative technology would impose an unreasonable hardship on Delmarva and Getty. In connection with this latter

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10. (Cont'd.)

2. That on or before May 1, 1972, Delmarva Power & Light Company certify in writing to the Regional Administrator of Region III of the Environmental Protection Agency the steps it will take or has taken to comply with paragraph 1 of this Order.

3. That commencing June 1, 1972, and continuing thereafter until further Order of the Environmental Protection Agency, Delmarva Power & Light Company, on or before the 10th day of each month, certify, in writing, to the Regional Administrator of Region III of the Environmental Protection Agency, the average sulfur content of the fuel by weight burned on each day during the preceding calendar month.

point Getty asserts that it has applied for a variance on the basis of this hardship and that enforcement of the regulation prior to a determination of its appeal from the Secretary's denial of a variance would deprive it of procedural due process.

The compliance order is alleged to be arbitrary, capricious and unwarranted by the facts. Its enforcement prior to a due process hearing would, Getty claims, amount to a taking of property without due process of law. Getty also alleges invalidity of the order due to non-compliance with the requirements of the National Environmental Policy Act, 42 U. S. C. § 4321, et seq.

The Administrator's position is that, inasmuch as Getty is attacking the regulation as being unnecessary and therefore unreasonable and unconstitutional, pre-enforcement judicial review of the compliance order is foreclosed by section 307(b), 42 U. S. C. § 1857h-5. Getty disagrees with the Government's statement of appellant's position, emphasizing its neutrality regarding the regulation on which the compliance order is based.

> "Getty accepts the Regulation, but only asks for more time to comply with it." [11]

Getty argues that the regulation is unnecessary because the national primary standard has already been achieved in New Castle county, and that the economic burdens imposed by the regulation when compared to environmental benefits render the regulation wholly arbitrary and unreasonable. The district court recognized that such attacks upon the Administrator's approval of a regulation can only be asserted in a section 307 proceeding. However, the court concluded that the Clean Air Act as a whole did

11. Appellant's opening brief, p. 12.

not foreclose pre-enforcement review because Getty was raising issues which would not be raised in a section 307 proceeding.[12] We find that no such issues were presented to the district court. Getty was posing a direct challenge to the regulation. No dispute exists regarding the underlying facts supporting the Administrator's compliance order. Absent such a factual dispute, there only remains the determination whether Getty's constitutional right to a due process hearing prior to the imposition of criminal sanctions for non-compliance was satisfied.

It was unnecessary for the district judge to determine whether the Clean Air Act as a whole precludes pre-enforcement judicial review by necessary implication. Getty was in the wrong court by virtue of section 307 of the Act. The Declaratory Judgment Act and APA could not afford a basis for jurisdiction.[12A] Getty's arguments against enforcement require a determination by the court whether the regulation is unnecessary, unreasonable or capricious. Whether Getty abides in the regulation "in its general application" is immaterial. If Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word "exclusive" in the statute providing for a forum for judicial review. *UMC Industries, Inc. v. Seaborg*, 439 F. 2d 953 (9th Cir. 1971). The Declaratory Judgment Act and the APA do not extend jurisdiction of

12. Although we agree with the trial judge's observation that it would be too speculative to draw an inference from the Clean Air Act that Congress had in mind only two types of judicial proceedings, section 307 proceedings and enforcement actions, we find his concern with the hypothetical "close case", where an honest difference of opinion exists whether an air quality regulation has been violated, to be unwarranted by the facts of this case.

12A. The district judge predicated jurisdiction to entertain the "issues presented" under 28 U. S. C. § 1337, the Declaratory Judgment Act, 28 U. S. C. § 2201, and the Administrative Procedure Act (APA), 5 U. S. C. § 701 et seq.

either the district courts or the appellate courts to cases not otherwise within their competence. See *Zimmerman v. United States Government*, 422 F. 2d 326 (3d Cir. 1970) cert. den. 399 U. S. 911 reh. den. 400 U. S. 855 (1970); *Mattingly v. Elias*, 325 F. Supp. 1374 (E. D. Pa. 1971).

Mindful as we are of the principle enunciated in *Abbott Laboratories v. Gardner*, 387 U. S. 136 (1967), that courts should restrict access to judicial review only upon a showing of "clear and convincing evidence" of a contrary legislative intent, we are equally impressed by Justice Frankfurter's admonition that "[s]tatutes * * * are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammer or formal logic may lay down.' * * * This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words." *United States v. Shirey*, 359 U. S. 255, at 260-1 (1958).

The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. "The formality and procedural prerequisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U. S. 371, at 378 (1971); see also *Ewing v. Mytinger and Casselberry, Inc.*, 339 U. S. 594 (1950).

A review of the tangled procedural history preceding Getty's institution of this suit convinces us that due process has been satisfied. First, Getty appeared at Delaware's hearing on the proposed implementation plan for attainment of air quality standards and argued against adoption of Regulation VIII. After approval by WARC, Getty had an opportunity to appeal the adoption of the regulation to the state Superior Court. It chose instead to seek a vari-

ance with the Secretary of Natural Resources and Environmental Control. The Secretary denied the application and Getty took an appeal to WARC. That appeal is still pending. The Administrator's adoption of Delaware's plan, and specifically Regulation VIII, received wide publicity in the media, and presumably came to Getty's attention in the fall of 1971. No appeal was taken from the Administrator's approval of the implementation plan to the Court of Appeals, as provided by the Clean Air Act. Instead, Getty chose to seek a restraining order in the Chancery Court of Delaware in December of 1971. Recently, that court denied a motion by the Delaware Secretary of Natural Resources and Environmental Control to vacate or modify the restraining order. Getty also took the opportunity to participate in the conference between EPA and Delmarva regarding possible violations of the regulations. In light of the above, Getty's protestations that the doctrines of ripeness and justiciability would have foreclosed it from obtaining meaningful review are frivolous. Furthermore, we reject Getty's attempt to establish the limited criteria for obtaining a variance contained in the Clean Air Act as a substitute for section 307 judicial review. Getty maintains that "[t]he adoption of the Regulation by the Commission involved the applicability of all the Regulations to the state as a whole and involved very different questions than are presented by the rather narrow question of a variance application which is made on the grounds of hardship to a Regulation which may be otherwise suitable for the entire state." However, the fact remains that the regulation in question quite possibly affects a single installation, i.e., Delmarva, in the designated area south of U. S. Route 40, since Delmarva is the only plant operating fuel burning equipment having a maximum rate of heat input equal to or greater than 500,000,000 b.t.u. per hour. Getty could

have raised the questions of economic hardship or lack of compelling necessity in a section 307 hearing that it sought to raise below. Its failure to do so cannot be attributed to any lack of sufficient notice or hearing.

The close case alluded to by the district court presents no problem, keeping in mind that in an enforcement proceeding, the burden of establishing a violation of the applicable regulation would be carried by the Government.[13] The admissions made by Delmarva, however, and the affidavit of intent submitted by its chief executive officer, make any allusion to the hypothetical "close case" unnecessary. We note further that, under 42 U. S. C. § 1857h-5(c), the review provisions of the Act provide for a much broader and more meaningful judicial review than either the district court or appellant recognized:

> "(5)(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for a hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original

13. See *United States v. Bishop Processing Company*, 423 F. 2d 469 (4th Cir. 1970), cert. den. 398 U. S. 904 (1970).

determination, with the return of such additional evidence."[14]

Getty has sought to litigate the merits of its variance application on this appeal. It requested a postponement of argument before WARC pending a judicial determination by either the Chancery Court or the Court of Appeals. We decline to substitute our judgment for that of WARC. There is no constitutional or statutory authority which would allow us to make such a determination. The Clean Air Act authorizes approval of a revision[15] of an implementation plan by the Administrator, after adoption by the state based upon reasonable notice and public hearings. 42 U. S. C. §1857c-5(a)(3). Getty attempts an end run around the Act by seeking pre-enforcement judicial review before WARC has had an opportunity to pass upon Getty's application for a variance, and before the Administrator has had an opportunity to review any forthcoming state

14. While this section supports a holding that pre-enforcement judicial review is available at least to the extent that a determination is made "under this chapter" on the record after notice and opportunity for a hearing, the record before us does not persent a challenge to the Administrator's findings that Regulation VIII was violated. See 42 U. S. C. § 1857c-8(a). Rather, the allegations presented in the district court and on appeal constitute a direct challenge to the necessity, reasonableness and constitutionality of Regulation VIII. Regulation VIII received approval of the Administrator as part of Delaware's implementation plan. Section 1857h-5(b)(1) provides that review of an Adminstrator's approval be sought in the court of appeals in the appropriate circuit. There is no dispute in the record that the findings of the Administrator respecting his determination of violations by Delmarva had occurred. Having failed to seek review of the Administrator's approval in a section 307 proceeding, it is foreclosed from doing so by the clear language of 42 U. S. C. § 1857h-5(b)(1). It would likewise be foreclosed from raising these objections in a civil and criminal proceeding for enforcement. 42 U. S. C. § 1857h-5(b)(2).

15. Under the EPA regulations, a state's decision to defer the applicability of any portion of the control strategy with respect to a source "will be deemed a revision" of the applicable implementation plan. 40 CFR § 51.32(f).

action. And here lies the crux of Getty's predicament: having failed to appeal the Administrator's approval of the Delaware plan, and faced as it is with the EPA's compliance order, Getty is presented with the choice of either compliance or breach, until such time as its application for a variance is favorably considered.

The district court noted that when the issue concerns timing of judicial review rather than the existence of said review, the procedures which must be afforded to an individual further depends upon the governmental interest in summary enforcement. There can be no question that the primary and secondary air quality standards serve substantial governmental interests—in the case of primary standards, protection of the public health; in the case of secondary standards—protection of the public welfare from any known or anticipated adverse effects associated with the presence of a specified air pollutant in the ambient air. 42 U. S. C. § 1857c-3.

The Administrator has a responsibility to see that a state plan will meet the national standards. Because of that responsibility, he has a vital interest in determining whether a particular deferral will have the effect of preventing attainment or maintenance of the national standard. However, until the criteria of 40 CFR § 51.32(a) through (f) are met, the Administrator is duty bound to enforce an approved implementation plan.

Getty's protestations of good faith attempts to find suitable technology which would enable it to comply do not affect the Administrator's duty of enforcement. Likewise, the conditions established for postponement of compliance in 42 U. S. C. § 1857c-5(f)(1) are not available to Getty in any event.

Appellant's efforts to establish the lack of necessity for early compliance due to the existence of primary air

quality in Delaware must fail. Section 110 of the Clean Air Act requires that state air implementation plans attain primary standards. It does not preclude such standards from being exceeded. Further, section 110(a)(2)(A)(i) provides that standards be achieved as expeditiously as practicable, but in no case later than 3 years from the date of approval of such plan. Getty's application for a variance envisions developing technology suitable for compliance to be available by 1976. The Clean Air Act allows, as an alternative to compliance with a secondary criterion, the use of emission control devices which would have the effect of achieving the same level of permissible emissions that observance of criteria such as fuel composition would achieve. The Act says nothing about deferring compliance *merely* because such technology is not available. Getty would have this Court make such a determination without any adequate record before it, and in the absence of findings by the Administrator pursuant to 42 U. S. C. §1857c-5(f)(1), under which a postponement can be granted.[15] Such a determination would be wholly improper, premature, and a clear usurpation of the Administrator's responsibility.

Appellant's remaining argument is that EPA's failure to file an environmental impact statement pursuant to section 102(2)(c) of the National Environmental Policy Act, 42 U. S. C. §4332(2)(c), renders the Administrator's compliance order ultra vires. Even if we were to agree in Getty's premise that EPA is subject to the NEPA require-

15. In addition to good faith efforts at compliance and the absence of necessary or alternative technology, this section requires the existence of alternative operating procedures and interim control measures to reduce the impact of the source on the public health, and also that the continued operation of the source be essential to national security or the public health and welfare. Application for postponent under this section must be made by the Governor of the state.

ment,[16] such an issue is properly raised in a Section 307 proceeding. To require an impact statement at the enforcement stage would do substantial harm to the Congressional purpose of obtaining expeditious compliance with primary and secondary air standards. Failure to utilize the section 307 proceeding forecloses review in a civil or criminal proceeding for enforcement. 42 U. S. C. § 1857h-5(b)(2). Furthermore, both EPA regulations and the guidelines drafted by the Council on Environmental Quality exempt regulatory activities from the impact statement requirements.[17]

Finally, the Administrator is given the responsibility of making policy reviews under 42 U. S. C. § 1857h-7, annual comprehensive economic cost studies under 42 U. S. C. § 1857j-1, and periodic reports to Congress under section 1857j-2. It is apparent that the Clean Air Act itself contains sufficient provisions for the achievement for those goals sought to be attained by NEPA.

We conclude that Getty's belated effort to attack Regulation VIII in the guise of pre-enforcement review of the compliance order is precluded by section 307 of the Clean Air Act. This appeal is a paradigm of confession and avoidance.

The case will be remanded to the district court with directions to enter an order of dismissal for lack of jurisdiction.

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16. The cases cited to us by appellant are not persuasive that the EPA is bound by NEPA. See *Kalur v. Resor*, 335 F. Supp. 1 (D. D. C. 1971); *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401 (D. D. C. 1971).

17. See EPA Regulation § 6.7, 37 F. R. 879; 36 F. R. 77.24-5.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

DOCKET NO. 293-113-72-02.

IN THE MATTER OF
ALLIED CHEMICAL CORPORATION
CLAYMONT, DELAWARE
PROCEEDING UNDER § 113(a), CLEAN AIR ACT, AS AMENDED

ORDER.

The following ORDER is issued this date pursuant to Section 113(a)(1) of the Clean Air Act, as amended, 42 U. S. C. § 1857(c)-8(a)(1) (hereinafter referred to as the "Act").

WHEREAS, on May 26, 1972, the Administrator notified the Allied Chemical Corporation (Allied) of a violation of Section 2.1, Regulation IX, of the Delaware Water and Air Resources Commission (a requirement of an "applicable implementation plan" as that term is used in Section 113(a)(1) of the Act), in that Allied, since January 1, 1972, has been emitting sulfur dioxide in its tail gases in quantities greater than those permitted by Table I of said regulation and in concentrations greater than 1000 parts per million; and

WHEREAS, pursuant to Section 113(a)(4) of the Act, opportunity to confer with representatives of the Environmental Protection Agency was given to Allied and on June 12, 1972, a conference to discuss this violation was held at the offices of Region III of the Environmental Protection Agency; and

WHEREAS, said violation has continued beyond the 30th day after the date of the Administrator's notification; and

WHEREAS, after review of the conference record and a thorough investigation of all relevant facts, including the seriousness of the violation and any good faith efforts to comply, it has been determined that compliance with said Section 2.1, Regulation IX, as hereinafter set forth, is reasonable; it is hereby

ORDERED.

1. That on and after September 15, 1973, Allied Chemical Corporation, Claymont Works, shall comply with Section 2.1, Regulation IX of the Delaware Water and Air Resources Commission.

2. That prior to September 15, 1973, sulfur dioxide emissions in the tail gases from the Allied Chemical Corporation, Claymont Works, shall not exceed a concentration of 3800 parts per million by volume and mass emissions shall not exceed 250% of the rate allowable under Section 2.1, Regulation IX of the Delaware Water and Air Resources Commission.

3. That on or before August 10, 1972, Allied shall submit to the Regional Administrator, Region III, Environmental Protection Agency, a critical path construction table for any emission control facility required for compliance with paragraph 1. Based upon such table and other relevant information, the Regional Administrator, Region III, Environmental Protection Agency, shall establish a schedule requiring the completion of incremental steps towards construction and installation of the emission control facility by such dates as said Regional Administrator determines are necessary to insure installation of the facility in the time required by paragraph 1. Such sched-

ule, when issued by the Regional Administrator, shall become a part of this order and completion of each incremental step shall be required on the date specified in such schedule.

4. That on or before October 10, 1972, and continuing every two months thereafter, Allied shall submit to the Regional Administrator, Region III, a written status report as to progress in construction and installation of the emission control facility. In addition, no later than 5 days after the date specified for the completion of each incremental step required pursuant to paragraph 3, Allied shall certify to the Regional Administrator, Region III, whether such step has been completed.

5. That commencing October 10, 1973, and continuing each month thereafter until further order of the Environmental Protection Agency, Allied shall submit a report to the Regional Administrator, Region III, indicating any tail gas emissions for any period during the preceding calendar month which exceeded the requirements set forth in Section 2.1, Regulation IX of the Delaware Water and Air Resources Commission or indicating that there were no such excess emissions. The reports shall be based upon a continuous record of tail gas sulfur dioxide content and a copy of all records upon which the reports are based shall be maintained until further order of the Environmental Protection Agency; provided, however, that copies of such records shall be submitted together with the first six reports required by this paragraph.

Date: July 18, 1972.

JOHN QUARLES, for
William D. Ruckelshaus,
Administrator, Environmental Protection Agency.

(Letterhead of)

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION III

6th & Walnut Sts., Philadelphia, Pennsylvania 19106

July 25, 1972

Mr. Thomas D. Kent
Corporate Counsel

Allied Chemical Corporation
P.O. Box 1057R
Morristown, New Jersey

Dear Mr. Kent:

Subject: Allied Chemical Corporation, Claymont, Delaware
Docket Number: 293-113-72-02

This is with reference to Paragraph 2 of the order issued in the above-captioned matter. As I indicated to Mr. Harry Wallum of your office by phone on Monday, July 24, there was indeed a mistake made with respect to the percentage of the rate allowable as incorporated in Paragraph 2. That paragraph was intended as an anti-degradation Clause and the 3,800 parts per million figure used was in fact intended to be the controlling figure. Accordingly, with the concurrence and approval of appropriate officials in the Office of the Administrator, Washington, D.C., the order is hereby amended to change 250% to 380% so that Paragraph 2 of the order shall now read as follows:

> That prior to September 15, 1973, sulfur dioxide emissions in the tail gases from the Allied Chemical Corporation, Claymont Works, shall not exceed a concentration of 3,800 parts per million by volume and

mass emissions shall not exceed 380% of the rate allowable under Section 2.1, Regulation IX of the Delaware Water and Air Resources Commission.

In all other respects, the order shall remain as issued. I appreciate your cooperation in this matter and apologize for any inconvenience caused by the above.

Sincererly,

DONA S. KAHN
Dona S. Kahn
Chief, Legal Branch
Enforcement Division

cc: Edward Reich
Jacob Hart
Marc Suffern

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-673

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., A DELAWARE CORPORATION, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A, pp. 6–37) is reported at 342 F. Supp. 1006. The opinion of the court of appeals (Pet. App. A, pp. 39–53) is reported at 467 F. 2d 349.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1972. The petition for a writ of certiorari was filed on November 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 307(b) of the Clean Air Act bars, as untimely, judicial review of petitioner's challenge to an order issued by the Administrator of the Environmental Protection Agency directing Delmarva Power & Light Company to comply with a federally approved state regulation banning the burning of fuel which has a sulfur content in excess of 3.5 percent by weight.

STATUTES INVOLVED

Section 307(b) of the Clean Air Act of 1970, 84 Stat. 1708, 42 U.S.C. 1857h–5(b), provides:

> (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial

review in civil or criminal proceedings for enforcement.

* * * *

Section 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332(2)(C), is set forth at Pet. 7–8.

STATEMENT

The material facts are not disputed. Petitioner, Getty Oil Company (Eastern Operations), Inc., operates a crude oil refinery in Delaware City, New Castle County, Delaware. One of the natural byproducts of its refining operations is fluid petroleum coke, which generally has a sulphur content of between 6 and 7 percent by weight. Pursuant to a contractual arrangement with Delmarva Power & Light Company ("Delmarva"), petitioner, by conveyor, transfers this fluid coke byproduct daily (a maximum of 1,500 tons per day) to a nearby power station owned and operated by Delmarva, where it is burned to produce electricity and steam for the refinery. If any electricity is left over after the requirements of the refinery have been met, it is sold by Delmarva to the public.

In September 1970, the Delaware Water and Air Resources Commission held public hearings on proposed air pollution regulations for the State of Delaware. Among the regulations considered was one limiting to 3.5 percent the sulphur content of fuel burned by a certain size plant in the region where the Delmarva power station is located. Petitioner and Delmarva appeared at the hearings and argued against adoption of this proposal. The Commission, however, approved the regulation on October 13, 1970; it pro-

vided that "after January 1, 1972, fuel having a sulphur content greater than three and five-tenths percent (3.5%) by weight shall not be utilized in the area south of U.S. Route 40 in New Castle County for fuel burning equipment having a maximum rate of heat input equal to or greater than 500,000,000 b.t.u. per hour" (Regulation XV).

The Delmarva power plant is the only installation in the specified area having the size equipment designated in the regulation, and thus alone must meet the 3.5 percent limit. This compares, however, with a one percent limit on sulphur content imposed by separate regulation on the other facilities having fuel burning equipment with smaller capacity (Pet. App. A, p. 8).

Neither petitioner nor Delmarva contested the Commission's approval of the sulphur emission regulations in the Delaware courts (see Pet. App. A, p. 8, n. 1). They became part of the State's implementation plan for attainment and maintenance of primary ambient air quality standards for sulphur dioxide, promulgated by the Administrator of the Environmental Protection Agency ("EPA") under the Clean Air Act, 42 U.S.C. 1857c–4, and were submitted to the Administrator for federal approval. On August 4, 1971, the Administrator approved the sulphur dioxide portion of the Delaware implementation plan.[1]

---

[1] As pointed out by the district court (Pet. App. A, p. 8): "While this approval received substantial publicity at the time and presumably came to [petitioner's] attention shortly after the action was taken, notice of the approval was not published in the Federal Register until February 3, 1972."

No objection to federal approval was raised by petitioner, or anyone else, during the 30-day period specified in Section 307(b)(1) of the Clean Air Act as the time within which to challenge such a decision by the Administrator. 42 U.S.C 1857h–5(b)(1). More than a month after federal approval, on September 28, 1971, petitioner applied to the Secretary of the Delaware Department of Natural Resources and Environmental Control (hereafter the "State Secretary") for a "variance" from the January 1, 1972 effective date of the 3.5 percent regulation. It based its application on the claim that national primary air quality standards for sulphur dioxide were already being met in the New Castle County area, and thus Delmarva could be allowed additional time to meet the State's sulphur emission requirement without endangering public health and welfare (Pet. App. A, p. 9). The power station burned each month approximately 110,000,000 pounds of fluid coke having a sulphur content of 6.91 percent—almost twice the allowable rate.

On December 28, 1971, the State Secretary denied the variance application. Contrary to petitioner's assertion, he determined that "compliance with the national sulphur dioxide primary standard would be achieved no earlier than late 1975 or early 1976" (Pet. App. A, p. 42, n. 6), if Delmarva were permitted to continue burning Getty's fluid coke byproduct. Such permission, the State Secretary concluded, "was precluded by the Clean Air Act and federal regulations promulgated thereunder" (*ibid.*).

Petitioner promptly appealed the State Secretary's denial to the Delaware Water and Air Resources Com-

mission ("WARC"); at the same time it sought in the Delaware Chancery Court a temporary restraining order against enforcement of the 3.5 percent sulphur emission regulation by the State Secretary while its appeal to WARC was pending. The restraining order was granted on December 30, 1971 (Pet. App. A, p. 42).[2]

On January 1, 1972, the Delaware sulphur dioxide regulations became effective. Six weeks later, EPA requested and received from Delmarva a statement of the sulphur content of fuel burned by its power station during January; similar statements were subsequently furnished for the months of February and March. On March 6, 1972, the Administrator advised Delmarva that it was in violation of the federally approved regulation limiting the content of sulphur by weight to 3.5 percent. At the request of both Delmarva and petitioner, a conference with representatives of EPA was held on March 20, 1972, to give the companies an opportunity to be heard. 42 U.S.C. 1857c–8(a)(4). Following that conference, it was determined that a violation of the regulation existed and had continued for more than 30 days after the initial notice thereof. On April 17, 1972, the Administrator, pursuant to his authority under Section 113 (a)(1) of the Clean Air Act (42 U.S.C. 1857c–8 (a)(1), ordered Delmarva to comply with the 3.5 percent sulphur requirement by May 1, 1972 (Pet. App. A, pp. 43–44, n. 10).

[2] Thereafter, petitioner wrote WARC and requested that action on its appeal be deferred pending the outcome of litigation in the federal and state courts. No further action has been taken by WARC (Pet. App. A, p. 42, n. 7).

Petitioner then commenced the present suit in the United States District Court for the District of Delaware on April 21, 1972, seeking preliminary and permanent injunctive relief and a temporary restraining order staying the effect of the Administrator's compliance order. Delmarva did not join in the suit; it filed an affidavit with the court expressing its intent to comply with the Administrator's order "unless relieved of compliance by an order of this Court pursuant to the application of Getty Eastern," and stating that it would "not run the risk of incurring criminal fines and jail sentences which might be imposed if it did not comply" (Pet. App. A, p. 11). Compliance would require the use of different fuel at the power station, the cost of which would be passed on to petitioner and Delmarva's other public customers. As a result, petitioner no longer would be able to receive its electric power from Delmarva essentially free of costs; instead, it estimates that the cost would be approximately $10,000 per day (Pet. 11).

The district court held that this estimated economic burden gave petitioner standing to challenge the Administrator's action (Pet. App. A, p. 13, n. 4), and that review of the issues presented was not precluded by the Clean Air Act (*id.* at pp. 18–19). Petitioner was denied all relief, however, since the district court considered "the likelihood of Getty's success on any of [its] arguments [on the merits] very slim" (*id.* at p. 22).

The court of appeals disagreed with the district court on the jurisdictional question. In its view, petitioner's "belated effort to attack Regulation VIII

[renumbered from Regulation XV] in the guise of pre-enforcement review of the compliance order is precluded by section 307 of the Clean Air Act" (Pet. App. A, p. 53). "This appeal," it concluded (*ibid.*), "is a paradigm of confession and avoidance." The case was remanded to the district court with instructions to dismiss for lack of jurisdiction.

ARGUMENT

The decision of the court of appeals is correct and does not warrant review by this Court. Petitioner recognizes that Section 307(b)(1) of the Clean Air Act precludes it from making a direct attack in the federal courts on the questioned sulphur emission regulation more than 30 days after the regulation receives EPA approval.[3] It seeks to avoid this provision, however, on the ground that the present suit is a challenge, not to the regulation *per se,* but to the regulation as applied to Delmarva under the Administrator's compliance order (Pet. App. A, p. 12).[4] But this

[3] Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), provides for review of the Administrator's approval of a state implementation plan under section 110 of the Act only by filing a petition "in the United States Court of Appeals for the appropriate circuit * * * within 30 days from the date of such * * * approval * * *."

[4] While petitioner may well have "standing" to challenge the validity of the regulation in a Section 307 proceeding, we do not believe it follows that petitioner also has "standing" to object to a compliance order directed at Delmarva. It is simply inaccurate for petitioner to claim that *it* will be subjected to "the imposition of criminal penalties if its challenge [here] fails * * *" (Pet. 15). The "standing" question need not be resolved in this case, however, since the federal courts have jurisdiction to decide the issues presented only in accordance with the procedure prescribed by Section 307.

argument conveniently ignores the fact that the 3.5 percent limitation on sulphur content imposed by the State of Delaware is not generally applicable to a number of facilities. It affects *only* the Delmarva power station, and in effect already gives that facility a special "variance" from the general one percent limitation on sulphur content that applies to the other fuel burning plants in the State (see p. 4, *supra*).

1. Petitioner contends that the Administrator's order to comply with the regulation by May 1, 1972, is unreasonable and constitutes an abuse of discretion. Its position is grounded on a claim of extreme economic hardship, and on the assertion that compliance by that date is unnecessary because the national primary air quality standards have already been achieved in New Castle County. But these are arguments pertaining to the validity of the sulphur dioxide regulation itself, which both in its application and effect differs from the compliance order only in that it sets an earlier date, January 1, 1972, for meeting the 3.5 percent requirement. As pointed out by the court below, petitioner has raised no issues in this suit which could not properly have been raised in a timely Section 307 proceeding (Pet. App. A, pp. 46, 48–49). There is no factual dispute here regarding the Administrator's issuance of the compliance order; the Delmarva power station concededly continues to burn petitioner's fuel having almost twice the allowable rate of sulphur content.[5]

[5] This is plainly not the hypothetical "close case" to which the district court made reference (Pet. App. A, p. 19). Nor does it follow from the decision below that "where there is an honest difference of view as to whether a particular establish-

In these circumstances, petitioner, having failed to make a timely objection in the court of appeals to a regulation pertaining only to its supplier of electric energy, cannot thereafter encourage its supplier openly to flout that regulation and then attack its validity "in the guise of pre-enforcement review" (Pet. App. A, p. 53) when Delmarva is ordered to comply. This is precisely the type of delay-tactic that Congress sought to prevent in Section 307 by designating the United States Courts of Appeals as the exclusive forums for judicial review of challenges such as the one raised here, and by limiting access to the appellate courts to 30 days from the date of federal approval of the contested regulation. See *Kennecott Copper Corp.* v. *Environmental Protection Agency*, 462 F. 2d 846, 849 (C.A.D.C.).[6]

ment is or is not in compliance with an applicable regulation" (*ibid.*), pre-enforcement judicial review would necessarily be unavailable. We need not speculate here, however, on the extent of judicial review in such hypothetical circumstances. For, in this case, as the court of appeals noted (Pet. App. A, p. 50, n. 14), "the allegations presented in the district court and on appeal constitute a direct challenge to the necessity, reasonableness and constitutionality of Regulation VIII."

[6] Congress has chosen similar procedural techniques in other regulatory fields to accomplish the same objective. The National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. 1381, provides for review of safety standards in the courts of appeals within 60 days of promulgation. *Automobile Parts & Accessories Association* v. *Boyd*, 407 F. 2d 330 (C.A.D.C.). A 60-day period for testing the validity of price control orders was affirmed in *Yakus* v. *United States*, 321 U.S. 414, where defendants were precluded from raising the invalidity of the orders in later criminal prosecutions. And compare *White* v. *Johnson*, 282 U.S. 367, where a party's attempt to raise constitutional issues was rejected because of his failure to appeal administrative action to the court of appeals as the statute required.

2. It will, of course, be a rare case when enforcement of an anti-pollution regulation does not impose economic burdens on those who must meet the clean air requirements. But the cost of compliance is plainly a matter for consideration in assessing the Administrator's approval of the state regulation in accordance with the review procedure prescribed by Section 307, especially where, as here, the regulation affects but one facility. The fact that petitioner will henceforth be deprived of free electric power and must, as its competitors are required to do, pay the going rate for fuel having an acceptable sulphur content, provides no basis for allowing it to raise at this late date an objection to the compliance order on the basis of an alleged economic burden that could have been fully considered in Section 307 proceedings. Indeed, even on the merits, as the district court accurately observed (Pet. App. A, p. 36), petitioner's "private interest in continuing to do business as it has done in the past is insufficient to frustrate Congress' desires in its regulation of public health and safety." [7]

[7] The district court also pointed out (Pet. App. A, pp. 27-28): "It is undisputed that low sulphur fuel is available and that, at the time of the issuance of the order, compliance by May 1, 1972 was feasible. [Petitioner] does not suggest that compliance with the regulation on May 1, 1972 would impose any greater or different burden upon it than compliance three months from now. Its argument that the May 1, 1972 date was arbitrary and unreasonable would apply to any date prior to the availability of alternative control technology. According to its best estimates this will probably be 1976. This is obviously not the type of consideration which Congress meant the Administrator to consider in setting a compliance date under Section 113(b)(4)."

Similarly, the claim that the 3.5 percent limitation is unnecessary because New Castle County already meets national primary air quality standards is an argument that should have been made in a Section 307 proceeding. Both the State of Delaware and the federal government have determined that the regulation is essential to meet the clean air objectives of the federal statute, and that determination was explicitly reaffirmed by the State Secretary in denying petitioner's application for a "variance." Petitioner has failed to suggest any reason why it should be permitted to continue violating an essential part of the State implementation plan so it can litigate a factual question that it failed to raise at the proper time (see Pet. App. A, pp. 51–52).

3. Nor is there substance to petitioner's claim that the decision below amounts to a deprivation of due process. As the court of appeals stated (Pet. App. A, p. 47): "A review of the tangled procedural history preceding [petitioner's] institution of this suit convinces us that due process has been satisfied." After briefly summarizing the events leading up to the present suit, the court below added (Pet. App. A, p. 48), "[i]n light of the above, [petitioner's] protestations that the doctrines of ripeness and justiciability would have foreclosed it from obtaining meaningful review are frivolous." These conclusions are fully supported by the record.[8]

[8] Petitioner argued below that enforcement of the regulation prior to a determination by WARC of its variance application will deny it procedural due process. As the district court pointed out, however, in rejecting this contention (Pet. App. A, pp. 25–26): "What [petitioner and Delmarva] are now trying to do in the variance proceeding is to persuade the Commission that a

Moreover, it is well established that due process does not require that identical procedural rights be afforded with respect to every government action that deprives an individual of a property interest. See *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599. As pointed out by the district court below (Pet. App. A, p. 32), "the scope and nature of the procedures demanded are dependent upon a balancing of the precise nature of the governmental function involved and the private interests affected by the governmental action." See *Boddie* v. *Connecticut*, 401 U.S. 371, 378; *Goldberg* v. *Kelly*, 397 U.S. 254; *Bowles* v. *Willingham*, 321 U.S. 503, 520–521. Where, as here, there is a valid public interest to be protected—*i.e.*, the achievement, "as expeditiously as practicable" (42 U.S.C. 1857c–5 (a)(2)(A)), of national primary ambient air quality standards to protect public health—this Court has sustained in other contexts summary enforcement procedures by the administrative agency involved against a due process challenge. Compare *Sniadach* v. *Family Finance Corp*, 395 U.S. 337; *Boddie* v. *Connecticut*, *supra*. Application of that principle is especially appropriate in the present case, both because of the availability of the procedure prescribed by Section 307 (if timely invoked) for review of the regulations

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better rule as applied to their situation would not require 3.5% until some later date. [They] may or may not be successful in this effort and the required further effort to persuade the Administrator that such a rule would not prevent attainment of the national standard within the pertinent time period. But the Constitution does not require that they be excused in the meanwhile from complying with the regulation." The court of appeals agreed (Pet. App. A, pp. 50–51).

(see cases cited and discussed in note 6, *supra*) and because, as the district court pointed out below (Pet. App. A, p. 36), "[a] holding creating a constitutional procedural due process right to pre-enforcement judicial review would permit any person to delay enforcement by raising even a frivolous challenge to the [Administrator's] determination."[9]

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1972.

[9] Petitioner's additional claim concerning the failure of the EPA Administrator to file an environmental impact statement in connection with his approval of the Delaware sulphur dioxide regulation is also foreclosed by his failure to raise the issue in a Section 307 proceeding. In any event, both the district court (Pet. App. A, pp. 28–31) and the court of appeals (*id.* at pp. 52–53) correctly ruled that Congress did not intend the impact statement requirements to apply to a determination by the EPA Administrator concerning federal approval or disapproval of all or part of a state implementation plan. As pointed out by the district court (*id.* at 31), "to require the interagency consultation and impact statement stipulated by the [National Environmental Policy Act] would seriously and unnecessarily impede effective enforcement of the Clean Air Act and similar federal regulatory programs."

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-673.

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., a Delaware Corporation,

Petitioner,

v.

WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency, and the ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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SUMMARY OF ARGUMENT.

The Government in its Answering Brief has chosen to ignore rather than answer the questions presented in the Petition for Certiorari. The brief omits any reference to, or discussion of, the statute under which the Administrator here purported to act. 42 USC § 1857c-8(a)(4). (Pet. p. 4). It relegates the National Environmental Policy Act (NEPA) question (Pet. p. 3) to an arbitrarily placed footnote. It fails to identify any compelling governmental interest sufficient to justify summary disposition of the compliance order without a due process hearing prior to enforcement. The Government evidently hopes the Court will draw the conclusion that the arguments it ignores are not worthy of rebuttal. In fact, the Government has chosen not to discuss the questions presented by this Petition because of its inability to deal with the questions presented in a convincing way.

ARGUMENT.

1). The Administrator totally ignores the provisions of 42 USC § 1857c-8(a)(4) which provides in pertinent part that:

> "Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

The Administrator argues that since this is a case of clear violation that his hands are tied and he must order immediate compliance. But that is simply not so. It is not what the statute, *supra,* provides for. The statute says

that after you have a violation then the Administrator must still fix a reasonable compliance schedule (not immediate compliance); that the Administrator must consider the *seriousness* of the violation and that he must consider the *good faith* efforts to comply. The statute grants the Administrator discretion to grant a violator future time to comply where the violation is not serious in its effect on the public and where the violator is making and has made good faith efforts to comply.

The Administrator would have the Court believe that Regulation VIII absolutely ties his hands. But that it is not how the Administrator acted in the *Allied* case. (Pet. A54-58). The Administrator in his Answering Brief ignores *Allied,* and with reason. Allied was denied a variance in the same opinion as was Getty by Delaware's Secretary of Natural Resources and Environmental Control. (Appellant's Appendix, Court of Apps., Swayze Aff., Ex. D., p. 68a). Allied was in clear violation of a regulation that became effective on the same date as the regulation involved here. Allied exists in the same ambient air as Getty, New Castle County, Delaware, yet Allied was granted a 20½ month extension from January 1, 1972 under 42 USC § 1857c-8(a)(4). If the Administrator's discretion could be granted in favor of Allied, why not Getty? The Government's brief is silent on this point. Indeed at the argument before the Court of Appeals, the Government's attorneys claimed to know nothing about the Allied matter at all.

The Government's brief asserts that since many of the arguments we advance under 42 USC § 1857c-8(a)(4) could also have been advanced in a § 307 petition that the Administrator's exercise of discretion under § 1857c-8(a)(4) is non-reviewable. This is a non sequitur. How could the exercise of his discretion have been reviewed by the Court of Appeals before he had exercised it?

The Government's reliance on cases under the Motor Vehicle Safety Act (GB p. 10, n. 6) is inapt. As the District Court observed, the Clean Air Act is not similar to the Motor Vehicle Safety Act. (Pet. A17 n. 10). The Clean Air Act does not set up nationwide regulations of general application. Rather, within certain guidelines it delegates to each state the responsibility to develop and handcraft for its region its own plan and regulations, and the emphasis is on flexibility. A reading of the Clean Air Act reveals the many opportunities for changes and adjustments in what is admittedly a complicated field. One avenue for adjustment is the state variance procedure which Getty pursued. Another opportunity for flexibility based on the stated criteria of the seriousness of the violation and good faith efforts to comply is provided for by § 1857c-8(a)(4).

2). The Administrator similarly avoids reference to *Abbott Laboratories v. Gardner,* 387 U. S. 136, 87 S. Ct. 1057, 18 L. Ed. 2d 681 (1967). Once the Administrator's discretion becomes apparent as it must upon analysis of § 1857c-8(a)(4), jurisdiction follows under the Administrative Procedure Act as interpreted by *Abbott* and others, as the District Court held (Pet. A13-21). Moreover, an independent basis of jurisdiction clearly exists under NEPA. In addition to the cases cited in our Petition (Pet. p. 16) on this point, Judge Winner recently reached the same conclusion in ***Anaconda v. Ruckelshaus,*** 4 ERC 940 (D. Colo. Dec. 18, 1972).

3). The Administrator's treatment of our claim to a due process hearing is similarly cavalier. Like the Court of Appeals, he fails to explain where we could have received a hearing on the exercise of the Administrator's discretion under § 1857c-8(a)(4). He fails to cite facts supporting a

compelling public interest in summary enforcement on the particularized facts of this case. Both the District Court and Court of Appeals recognized the absence of any such interest by staying enforcement pending judicial review. This stay remains in effect. Further, the Administrator asserts that if such a hearing were held, Petitioner would not prevail. Plainly the record in this case does not support such an assertion in view of the undisputed testimony concerning the high quality of the air and the tremendous economic impact without any corresponding public benefit. Surely this is not a frivolous challenge of the kind the Government refers to at GB p. 14. However, a party's right to a due process hearing is not dependent upon a showing that he will prevail. *Coe v. Armour Fertilizer Works,* 237 U. S. 413 at 424, 59 L. Ed. 1027 at 1031-32, 35 S. Ct. 625 (1915) and *Fuentes, et al. v. Shevin, et al.,* and *Parham, et al. v. Cortese, et al.,* — U. S. —, 32 L. Ed. 2d 556, 92 S. Ct. — (1972).

4). The Administrator's answer to the attack on his failure to prepare and circulate an environmental impact statement (GB p. 14 n.9) is singularly without case or legislative support. He fails to comment on the large number of decisions interpreting NEPA in accordance with its clear language, to mean that every federal agency must prepare impact statements where applicable. Since our Petition was filed, several recent cases have been decided which further strengthen our position and conflict with the Third Circuit's opinion in this case. We refer to *Anaconda v. Ruckelshaus, supra,* which held that NEPA was applicable to the EPA at the rule making stage and to *Morton v. Davis,* 4 ERC 1735 (10th Cir. Nov. 24, 1972) which held NEPA was applicable to the Department of Interior's approval of the Pueblo Indian tribe's lease of Indian land to a commercial developer. Using an argument which has

become increasingly popular with government agencies, the Bureau of Indian Affairs contended that Congress never intended that the Bureau be included under NEPA. The Court of Appeals rejected this contention noting that NEPA "directs all agencies to present a detailed statement on the environmental impact of the proposed action." *Ibid.* at 1736. The Court held, "[A]s our Court had occasion to consider once before, this Act [NEPA] was intended to include all federal agencies, including the Bureau of Indian Affairs." *Ibid.* at 1738. The Court of Appeals then addressed the narrower contention that the provision of 25 USC § 415 that ". . . the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to . . . the effect on the environment of the uses to which the lease land will be subject" was intended by Congress to supplant NEPA. The lower court held that NEPA did not apply to Indian lands or otherwise 25 USC § 415 would not have addressed the problem of environmental concerns. The Court of Appeals found this conclusion to be erroneous. The Court of Appeals in reversing the findings of the lower court held that, "unless the obligations of another statute are clearly mutually exclusive with the mandates of NEPA, the specific requirements of NEPA will remain in force." *Ibid.* at 1738.

Indeed there can be little doubt, that Congress did not intend the EPA to be exempt from the provisions of NEPA under the Clean Air Act in light of the specific exemption contained in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, § 511, which exempts only the EPA's activities under that Act. The EPA sought a general exemption from Congress and failed to get it. The fact that Congress included an exemption in the Water Act and not in the Clean Air Act is indicative of Congress's intention that the activities of the EPA under the Clean Air Act be subject to NEPA's requirements and *Anaconda v. Ruckelshaus, supra,* so holds.

CONCLUSION.

For the reasons stated in the Petition for a Writ of Certiorari and herein, it is respectfully submitted that the Petition should be granted.

Respectfully submitted,

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